

CRIMINAL PROCEDURE 1 NOTES:

CRIMINAL PROCEDURAL SYSTEM:

Substantive law: WHAT: it sets out what each persons rights and duties are, what the definition of the different crimes are and what the sanctions are when the rules are contravened – e.g. Criminal law	Adjectival/procedural law: HOW: what procedure must be followed for a sanction to be put into operation when a legal rule is contravened = how do we remedy the wrong – e.g. Criminal procedure, Civil procedure, Evidence.
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Distinction between public and private law:

<u>Private law</u> : rules which have regard to the relationship existing between individual people = family law and contract	<u>Public law</u> : consists of rules which have regard to the relationship existing between authority and the individual, the individual occupying the subordinate position = criminal law and criminal procedure.
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Crime control vs due process:

<u>Crime Control</u> This is based on the idea that the point of a criminal justice system is to prevent criminal conduct	<u>Due Process</u> : The aim of the criminal justice system isn't to secure a conviction and sentence by any means possible but rather to ensure the results are properly achieved by following procedure = looking at the rights of the person during all the pre and post trial stages. It is said that the criminal procedure system tends to over emphasise the rights of the criminal and neglect the rights of victims. The response to this is that two wrongs don't make a right, in other words just because someone is a victim of crime, it does not suspend the rule of law.
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JURIDICAL GUILT:

Is the idea that its not NB to secure a verdict by any means BUT the rules of evidence and criminal procedure should be complied with = this places the onus on the state to prove guilt beyond a reasonable doubt

RIGHTS OF SUSPECTS AND A:

In the constitution the A is protected in terms of S35.
This provides rights for both an arrested as well as an A person.

The rights of arrested people:

S35 of the constitution provides:

Every arrested person shall have the right:

1. To be informed, in an understandable language, that he has the right to remain silent and the consequences of making a statement. (S35 (a) & (b))
2. Not to be compelled to make a confession or admission, which could be used in evidence against him. (S35 (1)(c))

These rights are only for arrested persons

The rights of an accused person:

S35 (3) of the constitution provides:

Every accused shall have the right to a fair trial, which includes the right:

1. To be informed of the charge with sufficient details to answer it
2. To be presumed innocent, to remain silent during the plea proceedings as well as during the trial and not to testify during the trial
3. To adduce and challenge evidence and not to be a compellable witness against himself

Only accused people have these rights, they arise once the arrested person has been charged with committing an offence.

The right to silence:

The right to silence is ALSO called the privilege against self-incrimination. This right is afforded to both an arrested and an A person.

The Constitution guarantees the right of every ARRESTEE to remain silent – person has a right to silence in the pre-trial and trial stages.

If the A is unrepresented, he should be told of his rights which include: right to representation, right to silence, right to call witnesses, the right to cross examine etc.

Under common law the A silence could have an adverse inference, as it would be seen as circumstantial evidence of his guilt. As an innocent man would protest his innocence.

The A can't be penalized for exercising one of his rights = no adverse inference can be drawn because the A remains silent for 2 reasons:

1. There may be a number of reasons why the A remained silent, i.e. he doesn't trust the system, ignorant, afraid or he thinks the State's case is weak.
2. If the State doesn't prove all the elements of the crime, the A's silence doesn't mean that the missing element is proved = his silence can't fill the gaps in the State's case.

BUT the A case can be affected by his silence:

If the state has proved all the elements of the crime (the State has a *prima facie* case) and the A hasn't spoken – no doubt would have been raised and the court will have no choice but to find the A guilty.

The presumption of innocence – legal guilt:

In criminal procedure the victim is the complainant, but the State prosecutes. The victim is therefore NOT the plaintiff but only a WITNESS for the state.

The victim is represented by the state and the accused is represented by his attorney.

Before a charge is laid, a person is merely a suspect –

- *Suspect: someone who hasn't been charged = an arrested person.*
- *Accused: a person who has been charged with a crime.*

Due to the presumption of innocence, everyone is regarded as innocent until they are properly convicted by a court of law. This presumption is created to put the burden on the state to prove their case beyond a reasonable doubt.

Therefore an accused (A) may appear to be morally guilty of the crime but this doesn't necessarily mean that he will be found legally guilty – OJ Simpson.

The prosecution must prove guilty beyond a reasonable doubt. The onus rests on the prosecution because of the presumption of innocence.

The prosecution must prove every element of the crime beyond a reasonable doubt. The A only has to create doubt.

If the state does prove a *prima facie* case and the A does nothing to disturb that case, the *prima facie* case may harden into proof beyond a reasonable doubt, as there is nothing that produces doubt in the court's mind about the A's guilt.

The accused (A) can raise reasonable doubt by cross-examining state witnesses, producing contrary evidence etc.

The accused only needs to prove that there is a possibility that the state's version may not be true, even if the State's case seems more convincing.

The court must make its decision in an objective impartial manner, looking at the admissible evidence presented in court.

S35 (3) (h) of the constitution: every accused person has the right to a fair trial, which includes the right:

- To be presumed innocent
- Remain silent
- Not testify during proceedings

When the state violates rights in terms of the Bill of Rights the arrested or A person has certain Remedies:

Civil action for damages: this could be used for a wrongful arrest, if the police act without a warrant or contrary to the circumstances the Act provides when they can arrest with a warrant, it gives rise to delictual liability. The plaintiff must prove all the elements of delict

Criminal prosecution: the suspect or A could lay a charge if he is unlawfully assaulted by the police during arrest.

Writ Habeas Corpus: application interdict: is an order where the police are forced to exhibit the person in court. This remedy is resorted to, to get judicial review of police action and protects a subject against unlawful deprivation of liberty. The court is asked for an order that the respondent produces the body of the detainee before the court and show reason why he shouldn't be released. The person bringing the application must have prima facie reasons why the detention is wrongful.

Interdict: is issued on urgent application and the applicant must prove:

1. The existence of a right
2. The fact that the right has been infringed
3. The fact that no other remedy is available

Prohibitory interdict: is to stop the unlawful/ wrongful conduct

Mandatory interdict: force compliance with a legal duty

Exclusionary rule: **S35 (5) of the Constitution:** evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of

justice – e.g. *hearsay, privileged information, information received through torture etc.*

Informal remedies: when there is an unlawful arrest, the arrestee can resist arrest or escape from unlawful custody

Constitutional mechanisms: if state conduct amounts to a violation of one's fundamental rights, S172, can be used in order to declare the Act or conduct inconsistent with the constitution

ROLE OF THE VICTIM:

In our criminal system prosecutions are generally instituted by the Prosecuting authority and due to the adversarial system, there is a fight between the PP and the A. The victim/complainant is merely a witness for the state.

It is said that our current criminal procedure system is offender-orientated to the detriment of the victim and that present measures aimed at protecting or enhancing victim participation are generally insufficient.

Victim participation:

In offences of a sexual nature, investigating officers are obliged to obtain "impact statements" from the victim. These statements set out the nature and extent of the offence against the victim as well as how this has affected the victim's life. The impact statement is brought to the attention of the prosecutor and this statement is made before the victim testifies.

In crimes of a serious nature, relatives or complainants have the right to make representations at the convicted person's parole hearing.

Victim protection

The indictment of the A generally contains the name and address of potential state witnesses – this information can however be excluded if the witness could be intimidated

If there is a possibility that the witness could be harmed - they could testify behind closed doors or by means of CCTV and their identity not revealed = this however limits the A's rights in terms of S35 to a fair trial in that he has the right to confront his accuser. If the witness feels threatened in anyway or believes that he (or his family) will be harmed he may in terms of the Witness Protection Act apply to be placed under protection.

If the witness is below the physical or mental age of 18, the court may require the services of an intermediary if the court feels that the criminal proceedings would expose a witness to undue mental stress.

The victim can also institute a private prosecution when the prosecuting authority declines to prosecute.

NB!!!!!! (please study role of the victim in conjunction with the section relating to private prosecutions)

RESTORATIVE JUSTICE UNDER THE CJA:

In *Matyiti 2011*, Ponnann JA said restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending the state – it is an injury or wrong done to another person.

Def: Approach that aims to involve the child offender, the victim, the families + community members to together identify and address harms, needs and obligations – accept responsibility, restitution, prevent reoccurrence and reconciliation

Restorative Justice Sentences:

Child Court can following a conviction – refer matter to family group conference / victim-offender mediation

The Child Justice Act (CJA) 75 of 2008:

- Criminal justice system for children
- Possibility of diverting matters dealing with / involving children
- If not diverted – dealt in the criminal justice system in child justice courts (CJC):
 - ⇒ Persons under the age of 18
 - ⇒ CJC – any court dealing with a child
 - ⇒ Is child and adult charged together in terms of S155, 156 and 157 – the CJA must be applied to the child and the CPA to the adult

JURISDICTION

The general rule is that before a court can exercise jurisdiction it must be established that the offence was committed within that jurisdiction

Jurisdiction in respect of offences committed on SA territory:

General rule: the crime must have been committed in SA, to be tried in an SA court.

Provincial Divisions of the High Court: have original jurisdiction in respect of all offences committed in their respective areas:

Extension to this rule:

- a) Hull: one division has jurisdiction to put into effect a suspended sentence, imposed by another division.
- b) Civil Aviation Act: an offence is deemed to have been committed any place the A happens to be
- c) Fairfield: if an Act confers jurisdiction on a Magistrate Court in respect of an offence, the provincial and local divisions won't be excluded from hearing the trials
- d) S111 of the CPA: the NDPP can order a trial in a court within the jurisdiction although the offence was committed within another area of jurisdiction, if it's in the interests of the administration of justice – MUST BE ISSUED B4 the indictment is served on the A – *Mamase 2010*.

Regional and district courts (Magistrate courts):

General rule: S90 of the Magistrates Court Act: district or regional courts have jurisdiction to hear trials in respect of offences committed in that district or regional division.

Extension to the general rule in terms of S90:

4km rule: when a person is charged with any offence:

- 1) Committed within a distance of 4km beyond the boundary of the district or regional division.
- 2) Committed on a vessel or in a vehicle on a journey on a river in SA and such journey or part of it was performed in the district/regional division or within 4km thereof or
- 3) Committed on board a vessel on a voyage within the territorial waters of SA and these waters adjoin the district/regional division, or
- 4) Begun or completed in the district or regional division.

Such person may be tried within the district or regional division, as if he were charged with an offence committed within that district/regional division.

The 4km rule applies only in SA and not to crimes committed beyond our borders.

Also in terms of S90: where it's uncertain in which of several jurisdictions an offence was committed, it may be tried in any such jurisdiction.

A district or regional court may try an offence of the act or omission or even an element of the offence was committed within that division.

Any person charged with theft or receiving stolen property knowing it to be stolen may be tried in any division where he had such property in his possession.

Person charged with kidnapping or abduction may be tried in any division through or in which he conveyed, concealed or detained the victim.

Where the A committed several offences in different districts falling within the DPP's area, he can order in writing that the matters all be heard in one Magistrate Court in his area.

In terms of S110 of the CPA: if a person is wrongly charged before a particular court and fails to object timorously, such court will acquire jurisdiction.

S111: the NDPP has the power to move a trial from one DPP's area to another.

Jurisdiction in respect of offences committed outside SA

General rule: courts will only exercise jurisdiction with respect to offences committed in SA.

Exceptions:

- a) High treason: SA citizen who is resident in a foreign country and joins the enemy army in wartime
- b) Theft committed in a foreign country but the A has the stolen property in SA – theft is a continuing crime
- c) Offences on ships: territorial waters are part of the state, if the offence was committed on the open water (which is the jurisdiction of no state) the courts need to look at the effects and property involved
- d) Offences outside SA on a non-SA plane – plane lands in SA with the offender of board/ the principal place of business or permanent residence of the lessee of the plane is in SA/ offender is present in SA.
- e) Offences committed on territory subsequently annexed by SA
- f) Offences committed on an SA plane wherever it is (Civil Aviation Act)
- g) Offences committed by a SA citizen in Antarctica – jurisdiction of the Cape Magisterial District
- h) Offences deemed to be committed where A happens to be
- i) Embassies: diplomats remain subject to the jurisdiction of their home states.

SENTENCING JURISDICTION:

High Courts:

- Imprisonment including imprisonment for life
- Periodical imprisonment – also called weekend imprisonment
- Declaration as an habitual criminal
- Committal to a treatment center
- Fine
- Correctional supervision
- Imprisonment from which the A is place under correctional supervision.

Regional Courts: can't hear charges of High treason

- Imprisonment not exceeding 15 years
- Fine not exceeding R600 000 (R40 000 per year)
- Periodical imprisonment
- Declaration as an habitual criminal
- Committal to a treatment center
- Correctional supervision
- Imprisonment from which the A is place under correctional supervision.

District courts: can hear cases dealing with Rape, Robbery with aggravating circumstances and murder

- Imprisonment not exceeding 3 years
- Fine not exceeding R120 000 (R40 000 per year)
- Imprisonment from which the A is place under correctional supervision
- Committal to a treatment center
- Periodical imprisonment

HIGH COURT	REGIONAL COURT	DISTRICT COURT
Have original jurisdiction in respect of all offences	May try all crimes except treason	Can try all crimes except: ○ Treason ○ Murder ○ Rape

PUBLIC PROSECUTIONS

In SA the state prosecuted offences and the victim of the alleged offence is a witness for the state.

The state is represented by public prosecutors and the A is represented by his legal representative.

Constitutional provisions:

S179 of the Constitution provides for a single national prosecuting authority, which consists of NDPP and DPP's.

This authority has the power to institute proceedings on behalf of the State.

Parliament passed the National Prosecuting Act to give effect to S179.

The prosecuting authority consists of the following:

- NDPP: appointed by the president
- DNDPP
- DPP
- DDPP
- PP

Any person appointed as NDPP or DNDPP must have qualifications that enable him to practice in all courts in the Republic and he must be a fit and proper person.

The NDPP will hold office for a non-renewable term of 10 years

The NDPP can be suspended for misconduct, continued ill health, incapacity to carry out his duties and on account of no longer being a fit and proper person.

Legislation must make sure that the prosecuting authority practices without fear or favour, they must be independent

The prosecuting authority isn't part of the judiciary

Powers, functions and duties of the NDPP

1. He has authority over the exercising of all powers and performance of all duties conferred in the Constitution
2. He determines prosecution policy and issues directives
3. He must intervene when the directives aren't complied with.
4. He can review a decision to prosecute or not prosecute.
5. Where an offence was committed within the jurisdiction of one DPP, he can direct that the investigation and proceedings be conducted in the area of another DPP.
6. He can conduct any investigation he deems necessary in respect of the prosecution process
7. He can direct the submission of and receive reports from the DPP's
8. He can advise the Minister of Justice on all matters relating to the administration of criminal justice
9. He must maintain close liaison with the DNDPP and DPP's
10. He must consider recommendations, suggestions and requests concerning the prosecuting authority.

11. He must assist the DPP's and PP's in achieving effective and fair administration of criminal justice and representing their professional interests.
12. He must prepare a report in respect of the operations of the prosecuting authority.
13. He must advise the Minister of Justice on creating a structure in terms of which any person may report complaints or improper conduct.
14. He must frame a code of conduct, which shall be complied with by members of the prosecuting authority.
15. He must develop training programmes for prosecutors
16. He has the power to institute and conduct prosecutions in person.

Powers, duties and functions of the DPP's

1. Qualifications of the DPP are the same as those for the NDPP
2. A DPP must report to the NDPP
3. He may institute and conduct criminal proceedings and carry out functions for his area.
4. He may supervise, direct and co-ordinate the work of the DDPP's and PP's in his area.
5. He can conduct investigations
6. An investigating director may institute any action or prosecute an appeal in any court in the Republic.
7. He must at the request of the NDPP, submit reports to him.
8. He must submit annual reports to the NDPP
9. He is responsible for the day-to-day management of the DDPP and PP under his control.
10. He may prosecute and appeal in court

PROSECUTING AUTHORITY AND THE POLICE:

There is a National police service, which is an independent government organ under the control of the relevant minister. Their actions are governed by the SA Police Services Act.

The police must investigate and prevent crimes.

The police do exercise a discretion in which they must not bring trivial matters to the attention to the prosecuting authority. BUT the decision to prosecute rests with the prosecuting authority.

This separation between the police and the prosecution keeps them objective and allows for co-operation between them regarding the investigating and preparing for trial.

The police prepare the docket for submission to the prosecuting authority, who then decides whether or not to prosecute

Police investigate when they get a complaint from the public, on their own initiative or on the instructions of the prosecuting authority. Police prepare the docket for the PP who decides whether to prosecute or not.

The PP looks at: witnesses statements, documentary evidence and real evidence – he has control over the investigation and can give instructions to the investigating officer.

BUT he cant actively participate in the investigation – must avoid becoming a potential state witness.

THE PROSECUTING AUTHORITY AND THE COURT

The courts have on rare occasions expressed their disapproval of the fact that a prosecution is instituted. However the courts cannot in principle, interfere with a bona fide decision of the prosecuting authority.

The courts can at most impose a lenient sentence, reflecting their opinion that the prosecution was unwarranted.

If convinced of the triviality of the case, the court may acquit the A – *de minimus non curat lex*.

On the whole the courts are reluctant to comment on the bona fide discretion exercised by the prosecuting authority. This is because once the A is on trial; he will have the opportunity to put his defence to the court.

HOWEVER, the courts can intervene when the discretion is used improperly: where mala fides can be proved.

S92 of CJA: - if it comes to the attention of the court / probation officer that a child has been used by an adult to commit a Schedule 1 / 2 crime – report adult to SAPS, consider prosecution, adults involvement to be considered when dealing with the child in the child justice system

DISCRETION TO PROSECUTE:

A prosecutor has a duty to prosecute if there is a prima facie case and no compelling reason for refusal = “if there is a reasonable prospect of success”.

In exercising this discretion, the DPP/PP must respect the individual’s right not to be harassed by a prosecution that has no real prospect of success.

When considering whether or not to prosecute prosecutors take into consideration the following factors:

Nature and seriousness of the offence:

- The seriousness of the offence taking into account the view of the victim and the manner in which it was committed.
- The nature of the offence as well as the economic impact of the offence on the community.

Interests of the victim and the broader community:

- The attitude of the victim towards the continuing or discontinuing of the prosecution.

Circumstances of the offender:

- Previous convictions of the offender
- Whether the accused has admitted guilt or whether the accused shows remorse and is willing to co-operate with the authorities.
- Whether an alternative to prosecution would be better suited to the situation, in accordance to the objectives of the criminal justice system.

On rare occasions there are good grounds for refusing to prosecute, despite there being a prima facie case:

- a) Triviality of the offence.
- b) Advanced age of the A
- c) Young age of the A
- d) Tragic personal circumstances of the A (father who causes the death of his children through negligent driving)

When exercising the discretion, the police should not knowingly allow a pattern of contravention to develop and then arrest and prosecute and the DPP mustn't exercise his discretion in a discriminatory way.

PRESCRIPTION:

The right to prosecute shall lapse after the expiration of 20 years (unless some other period is expressly provided by law) from the time the offence was committed. The following common law crimes have NO PRESCRIPTION period

- Murder
- Treason
- Robbery with aggravating circumstances
- Kidnapping
- Child stealing

The following statutory crimes have NO PRESCRIPTION period

- Rape
- Compelled Rape
- Trafficking in persons for sexual purposes
- Using a child who is mentally ill or disabled for pornographic purposes

PP AS DOMINUS LITIS:

The PP is the master of the case, in that he determines the charges, the date and place of the trial.

- ❖ He formulates and consolidates the charges, in that they can be heard in one trial (S83)
- ❖ He determines the order in which the accused are called
- ❖ The JO has no authority to close the states case if the prosecution is unwilling

Withdrawing a charge and stopping a prosecution

<u>Withdraw charge:</u> ❖ The DPP/PP has a discretion to withdraw the charge ❖ BEFORE the A pleads ❖ The A isn't entitled to an acquittal and he may be prosecuted again if new evidence is discovered. ❖ PP can withdraw a charge without the consent of his DPP (if the DPP isn't satisfied with the PP's withdrawal, he can charge the A afresh).	<u>Stopping a prosecution:</u> ❖ The DPP may at any time after the A has pleaded, BUT before conviction, stop the prosecution in respect of the charge. ❖ The A is then entitled to an acquittal and can later successfully rely on <i>autrefois acquit</i> (previous acquittal). ❖ PP CANNOT stop a prosecution without the consent of the DPP.
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DIVERSION i.t.o the CJA:

Diversion – of a matter involving a child away from the formal court procedure – PP can initiate / play active role in diversion

Diversion by PP - minor offences (schedule 1) – S41 & 42

Prosecutorial diversion:

- Section 41 provides that prosecutors have the authority to diversion certain matters before the preliminary inquiry. However, this only applies if it involves a Schedule 1 offence and the diversion may only be to a level 1-diversion option.
- In addition, this may only occur if the prosecutor is satisfied that certain factors are present. These factors include that the child must acknowledge responsibility for the offence; there must be a prima facie case (enough evidence to institute a prosecution) against the child; the child must not be unduly influenced; and the child and his or her parent, guardian or appropriate adult must consent to the diversion.
- Furthermore, if it is a child who is 10 years or older but under the age of 14 years, the prosecutor must be satisfied that criminal capacity can be proved.
- In order for this type of diversion to happen, the child must have been assessed. However the prosecutor can dispense with

the assessment if it is in the best interests of child and the reasons for dispensing with the assessment must be recorded on the court record by the magistrate in chambers who will make the diversion an order of the court.

- If the prosecutor thinks that the child is in need of care and protection, then prosecutorial diversion cannot occur. Instead, the child must be referred to a preliminary inquiry for the inquiry magistrate to consider referring the child to the children's court.
- In making a decision to divert a child in terms of section 41, the prosecutor must take into account whether the child has a record of previous diversions.
- If the prosecutor is faced with a child where he or she decides not to divert even though it is a Schedule 1 offence, for example, if there are many previous diversions, then he or she must make arrangements for the child to appear at the preliminary inquiry.

Section 42 provides that where a prosecutor has diverted a matter involving a child, then the child and (where possible) his or her parent, guardian or appropriate adult must appear before a magistrate in chambers to make the diversion option an order of the court.

Diversion by PP – after preliminary enquiry / during trial (S51 & 52)

Section 52(1) provides that a matter may be considered for diversion at the preliminary inquiry (or later at trial before the child justice court) if:

- The child acknowledges responsibility for the offence;
- The child has not been unduly influenced to acknowledge responsibility;
- There is a prima facie case against the child;
- The child has consented to the diversion along with his or her parent, guardian or appropriate adult if available; and
- The prosecutor (in relation to Schedule 1 and 2 offences) or the DPP (in relation to Schedule 3 offences) indicates that the matter may be diverted.

Where the prosecutor or DPP decides to divert a matter, the requirements of section 52(2) and (3) must be met.

In terms of section 52(2), a prosecutor can divert a Schedule 1 or 2 offence if the views of the victim or any other person who has a direct

interest in the affairs of the victim are considered (unless not reasonably possible to do so) and he or she has consulted with the police official responsible for the investigation of the matter.

Section 52(3) provides that the relevant DPP who has jurisdiction of the matter is the person who may divert a matter involving a Schedule 3 offence. This illustrates how cautious the legislature was when considering the diversion of a matter where a Schedule 3 offence was committed. However, such matters can only be diverted if exceptional circumstances exist (as determined by the National Prosecuting Authority (NPA)) and the DPP must indicate his decision to divert such matters in writing.

The DPP must also afford the victim the opportunity to express his or her views on whether the matter should be diverted; the nature and content of the diversion option being considered; and the possibility of including in the diversion option a condition relating to compensation or the rendering of a specific benefit or service. The DPP must then consider the views expressed and must consult with the police official responsible for the investigation of the matter.

The Act provides that a matter can be postponed in order to get the necessary written indication from the DPP to divert a matter involving a Schedule 3 offence. Once received, this written indication must be handed to the magistrate and becomes part of the record of the proceedings.

NB TO DISTINGUISH BETWEEN LEVEL 1 AND LEVEL 2 DIVERSION ORDERS:

Level 1 – schedule 1 offences only

Level 2 – schedule 2 & 3 (more serious offences)

Factors to consider if diversion followed – S54

- Cultural / religious background of the child
- Educational level and domestic circumstances
- Proportionality with regard to circumstances of the child / nature of the offence / interest of society
- Child's age / development needs

May also develop “Individual diversion option” – must be in line with S51

S55 provides:

Must strike a balance between the circumstances of the child and the nature of the offence + interest of society

- Cant harm child physically / mentally
- Must be appropriate re age / maturity
- Cant interfere with schooling
- Cant exclude certain children due to lack of resources

- Sensitive to circumstances of victim

If possible:

- Impart useful skills
- Heal relationships (victim as well)
- Understand impact of behavior
- Location must be accessible by the child
- Be suitable in a variety of circumstances
- Be able to measure effectiveness
- Equal application
- Involve parents / guardian/ appropriate adults if applicable

NB – schedule for child offences different from schedule for adult offences!!!!

- ⇒ Broadly speaking, Schedule 1 contains minor offences,
- ⇒ Schedule 2 more serious offences and
- ⇒ Schedule 3 the most serious offences. There are also maximum time limits for diversion set out in section 53(5), which are linked to both the level of the diversion option and the age of offender.

Level 1:

Applies to Schedule 1 offences, and if any time period is applicable, may not exceed –

- ✓ 12 months in the case of children under the age of 14 years, and
- ✓ 24 months for children 14 years of age or older.

Level 2:

Applies to Schedule 2 and Schedule 3 offences, and if any time period is applicable, may not exceed –

- ✓ 24 months in the case of children under the age of 14 years, and
- ✓ 48 months for children 14 years of age or older.

Level 1-diversion options range from informal orders to admission to formal interventions and programmes.

They consist of:

- ⇒ An oral or written apology;
- ⇒ Formal caution, with or without conditions;
- ⇒ Placement under a supervision and guidance order;
- ⇒ Reporting order;
- ⇒ Compulsory school attendance order;
- ⇒ Family time order;
- ⇒ Peer association order;
- ⇒ Good behavior order;
- ⇒ An order prohibiting the child from visiting,
- ⇒ Frequenting or appearing at specified places;
- ⇒ Referral to counseling or therapy;
- ⇒ Compulsory attendance of vocational, educational or

- therapeutic programmes;
- ⇒ Symbolic restitution;
- ⇒ Restitution of a specified object;
- ⇒ Community service;
- ⇒ Provision of some service or benefit by the child to a victim; and
- ⇒ Payment of compensation.

The level 2 diversion options include the possibility of options available under level 1, but then supplement those with more intensive interventions in order to address the seriousness of the offence that the level 2 options cater for. In addition to the level 1 option, further level 2 options include:

- ⇒ Compulsory attendance of vocational, educational or therapeutic programmes, which may include a period of temporary residence;
- ⇒ Referral to intensive therapy, which may include a period of temporary residence; and
- ⇒ Placement under the supervision of a probation officer on conditions, which may include the restriction of the child's movement without prior written approval.

Section 53(7) provides for family group conferences, victim offender mediations or other restorative justice processes to be available as diversion programmes and are not restricted to a particular level.

DIVERSION OF SCHEDULE 3 MATTERS – 52(3)

DPP can in writing say that a schedule 3 offences may be diverted in EXCEPTIONAL CIRCUMSTANCES only (as determined by the NDPP)

- Particular youthfulness
 - Particularly low development of a child
 - Presence of particular hardship / vulnerability / handicap (heads a household)
 - Victim prefers diversion to trial cause doesn't want to testify in court
 - Compelling mitigating circumstances
 - Child used by adult to commit crime
 - Witness for the prosecution are fragile / unwilling
 - If proceed with trial could be damaging to child witness / victim
- DPP – can't delegate this power

DIVERSION of schedule 3 offences may only take place upon the written indication of the DPP

CRIMINAL CAPACITY OF CHILDREN

CL – *infans* (infants) (not yet 7 years of age) lack criminal capacity – thus immune from prosecution.

CJA – child below age of 10 lacks criminal capacity and can't be prosecuted

CL – *impubes* (no longer infant but not yet 14) – rebuttably presumed to lack criminal capacity

CJA – child 10 years or older but not yet 14 – presumed to lack criminal capacity, unless prosecution proves child has criminal capacity

HOW = prove BRD at time of offence child understand diff between right and wrong and act accordingly – if found to be lacking such understanding – refer child to probation officer to be dealt with same as child under 10 years of age.

IF HAVE UNDERSTANDING – divert if schedule 1 / refer to preliminary inquiry

Factors to consider (10 -14)

- Educational level, environmental, domestic circumstances
- Age and maturity
- Nature and seriousness of offence
- Impact on victim
- Interest of community

WITHDRAWAL OF CASES AGAINST CHILDREN

Can't merely withdraw case against child if best interest of the child calls for intervention – in line with S28 (2) of the Constitution: 'a child's best interests are of paramount importance in every matter concerning the child.'

PRIVATE PROSECUTIONS

CRIMINAL PROCEDURE ACT:

S12: Mode of conducting private prosecution.

1. A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.

2. Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the State.

S13: Attorney general may intervene in private prosecution. An attorney-general or a local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

S14: Costs in respect of process. A private prosecutor, other than a prosecutor contemplated in section 8, shall in respect of any process relating to the private prosecution, pay to the clerk or, as the case may be, the registrar of the court in question, the fees prescribed under the rules of court for the service or execution of such process.

S15: Costs of private prosecution. (1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.
(2) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that where a private prosecution is instituted after the grant of a certificate by an attorney-general that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

S16.Costs of accused in private prosecution.

(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

CONDUCT OF A PRIVATE PROSECUTION:

Due to the fact that the prosecutor has discretion whether or not to prosecute, some cases may be disregarded.

In such a situation a private person can institute criminal proceedings in lieu of the state

The private prosecution must be instituted and conducted in the name of the private prosecutor – all process must be issued in the name and at the expense of the private prosecutor.

The names are reported as follows: Smith v Jones, instead of state v the accused

A still has right to a fair trial (S35) as guaranteed in the Constitution – *Bothma v Els*

2 requirements:

1. A private prosecutor must have locus standi and
2. Produce the certificate nolle prosque before he can initiate any proceedings.

Locus standi of a private prosecutor:

1. Any private person who proves SUBSTANTIAL AND PECULIAR INTEREST in the issue of the trial, arising out of some injury, which he suffered in consequence of the offence – there must be a causal connection between the injuries, *suffered by the private prosecutor and the commission of the offence.*
2. A husband if the offence is committed in respect of his wife
3. A wife or child, if none, any next of kin of a deceased person, if the death is alleged to have been caused by the offence.
4. The legal guardian or curator of a minor or lunatic, if the offence was committed against the ward.

The certificate nolle prosequi:

No private prosecutor wanting to proceed may do so, unless he produces the certificate nolle prosequi.

This certificate is signed by the DPP, in which he confirms:

- a) He has examined the statements on which the charge is based and
- b) He declines to prosecute.

The DPP can't investigate whether the person has locus standi; at trial the A can raise lack of locus standi.

The certificate will lapse unless proceedings are instituted within 3 months of the date of the certificate.

Deposit:

No private prosecutor may issue any process commencing a private prosecution unless he deposits R2500 with the Magistrates Court = security that the private prosecutor will prosecute the charge without undue delay.

If the private prosecutor doesn't appear on the day set down for appearance, the charge against A will be dismissed UNLESS, the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control.

Generally the costs and expenses of the prosecution will be paid for by pay the costs.

The DPP can apply for proceedings to be stopped so that the prosecution may be instituted or continued at the instance of the State.

PVT PROSECUTION AND THE CJA

S59 (2) – can't institute private prosecution against a child if matter diverted in terms of the CJA

S18 of the CPA: Prescription of right to institute prosecution. The right to institute a prosecution for any offence, other than the offences of—

1. Murder;
1. Treason committed when the Republic is in a state of war;
2. Robbery, if aggravating circumstances were present;
3. Kidnapping;
4. Child-stealing;
5. Rape
6. The crime of genocide, crimes against humanity, war crimes

Shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

RIGHT TO REPRESENTATION:

The A is represented by his legal representative:

Introduction

The A in terms of the Constitution has the right to representation; this is entrenched in the fact that he has the right to a fair trial

This right has been entrenched in S35 of the constitution and confirmed in S73 of the CPA.

The effect of S35 is that the arrested as well as the A person must be provided with legal representation at the expense of the state if substantial injustice would result.

The A must accept the legal representation appointed by the State.

The right to assistance in the pre-trial stage

S35 entrenches a detained person's right to choose and consult with a legal practitioner and be promptly informed of this right.

A person who has been arrested is in detention from the moment of his arrest and thus immediately qualifies for this right.

However the arrested person is entitled to exercise his rights at any stage during his detention.

NB: the arrested person must be informed of this right in a manner that it can reasonably be supposed that he understood the right and the importance of it.

The state is required to inform the detained person of his rights at the time of his arrest. HOWEVER he must in addition be informed of this right at every stage where his co-operation is required.

If he isn't so informed, any evidence so obtained can't be used against him at the trial.

The right to assistance during the trial

S35 states that the A must be told his rights – the judicial officer has a duty to inform an unrepresented A that he has the right to be legally represented.

The judicial officer must explain this right and point out to the A that he has the right to be assisted by a legal representative with whom he can communicate in his own language or through an interpreter.

A failure on the part of the judicial officer can lead to a complete failure of justice.

When the court explains to an undefended A of his right to representation and the A who is facing serious charges, elects to represent himself – the court should ask why and if the A is under some misunderstanding, it must set it right.

HOWEVER: only to inform the A of his right is worthless, if he is too poor to afford it.

THUS: the constitution provides that the A must be informed that he is entitled to have legal representation appointed for him, at the States expense, if substantial injustice would otherwise result.

Duty to afford the A an opportunity to get legal representation

The right to legal representation includes the right to be afforded a reasonable opportunity of securing it.

So the A may apply for a postponement to enable him to get representation.

In certain instances a failure by the court to grant a postponement, amounts to an irregularity.

If the A's representative withdraws from the case, the court should ask the A whether he wants to instruct another legal representative or whether he wishes to undertake his own defence.

A failure to do so invalidates proceedings. BUT if the A is given ample opportunity to get legal representation and he doesn't, he can't then attack the proceedings, unless he has a reasonable explanation for his failure.

If the failure by the court a quo to allow a postponement is found to be irregular, the conviction will be set aside.

The role of the legal representative

A trained legal representative must assist the A.

An A under 18 may also be assisted by his parents or guardian in terms of the CPA.

S73 of the CPA: if the court believes it's necessary that another person assist the A, the court can grant permission to the A.

The court won't allow the same advocate to defend two A with interests that conflict in a material respect.

Generally the A is bound by what is done by his legal representative in the execution of his mandate during the trial.

Accessibility of the legal representative

Pro deo council (state appoints) is appointed for an indigent A in certain serious cases.

If the charge isn't of a serious nature and the A cannot afford representation, the court sometimes has a duty to determine (before the trial) whether the absence of a representative for the A would prejudice him to such an extent, that continuation of the trial would result in an unfair trial.

If the court believes that the A should be assisted, it must refer the matter to a legal aid scheme or lawyers willing to do pro bono work. The court should decline to continue the trial until such time that the legal representation is procured.

The legal aid board grants legal aid to needy people – so do public defenders.

The duty of the PO to inform a person of a right to legal representation

Radebe: the PO has a duty to inform an unrepresented A of their right to legal representation under **common law** = Where the charge is serious and justifies a sentence that is prejudicial to the A = encourage her to take advantage of her right to legal representation and afford her an opportunity to obtain legal counsel

Dyanti: the court made a distinction between the constitutional right to retain legal counsel at the states expense when a material injustice would arise without it and the common law right to legal representation, which entails the right to be informed about it, as well as the right to apply to the legal aid board for legal assistance and the opportunity to retain it.

We are of the opinion that the A should also be informed of his constitutional rights

Legal consequences of a failure to inform the A of this right:

Dyanti: the court decided that where the PO fails to inform the A of his common law right to representation, an irregularity might arise. The irregularity doesn't in itself result in an unfair trial that will persuade the court of appeal to set the conviction aside.

Q: whether the conviction has been affected by the irregularity – the A will have to show on appeal or review that the irregularity resulted in a failure of justice.

An irregularity will lead to a failure of justice where there has been a real or material prejudice to the A.

The test to determine whether the irregularity of failure to inform the AS of his common law right led to failure of justice is:

where the A suffered no prejudice, no failure of justice has been caused, just as there will be no injustice if the A were found guilty all the same, regardless of the irregularity and even if the PO didn't neglect to inform him of his right.

The A is entitled to show prejudice by submitting a declaration under oath to the court of appeal in which it was stated that she was unaware of her common law right and therefore unable for lack of legal representation to submit her defence during the trial.

Also had she been aware of this right, she would have exercised it, either by getting counsel on her own or with the assistance of the legal aid board.

CRIMINAL PROCEDURE ACT:

Substantial injustice will arise in respect of a person who is the accused at proceedings if legal representation is not made available to the accused at state expense in circumstances where the accused is unable to afford the cost of his/her own legal representation in respect of the contemplated proceedings.

Assignment of legal representation at State expense

If the legal aid applicant qualifies for legal aid in terms of the means test or in terms of the decision of the Director the legal aid officer receiving the application for legal aid shall instruct a legal practitioner to represent the legal aid applicant

In the event of a prisoner declining and/or failing to apply for legal representation at state expense the presiding judicial officer concerned shall nevertheless be entitled to advise the legal aid officer of the magisterial district in which the proceedings are scheduled to take place and/or are taking place that the said presiding judicial officer considers it to be in the interest of justice that a legal practitioner be appointed to represent the said prisoner. Upon receipt of such a notification by a presiding judicial officer the legal aid officer shall act as if the prisoner had applied for and qualified for legal aid.

LEGAL REPRESENTATION OF CHILDREN

Child has equal rights to an adult when it comes to a right to legal representation – S35

Parents / guardians / appropriate adults – assist children in proceedings & participate in decisions affecting the children

The legal representative must:

- If possible allow child to give independent instructions
- Explain rights and duties in language / terms understandable by the child
- Promote diversion – BUT cant influence child to accept responsibility
- Try prevent delay and always insure best interest of the child
- Highest standard of ethical behavior and professional conduct

AT PRE-TRIAL STAGE

Children to be detained in ltd circumstances ONLY

Child must be assessed by PO & preliminary inquiry to be held – see if matter to be diverted / charged in child justice court

PO to conduct an ASSESSMENT – to gather certain info such as:

- Age if not determined
- Protection of child if needed
- Any previous convictions / diversion / pending charges
- Make recommendations
- Is child u/10 or 10 – 14 with unlikelihood to have criminal capacity – establish measures: counseling / therapy / etc
- 10 – 14 see if expert evidence needed to determine capacity
- Was child used by adult to commit offence
- Any other relevant info in best interest of child

Po must explain purpose of assessment to the child and allow the presence of person (incl legal rep) necessary for the assessment. Info provided by any person - inadmissible evidence during bail / plea / trial / sentencing in which child appears.

PRELIMINARY INQUIRY – informal pre-trial (inquisitorial) held in court / suitable place = CJA doesn't prevent representation by legal rep at the inquiry.

NATIONAL INSTRUCTIONS TO THE POLICE – internal directives that are binding on police officials + if not followed = internal disciplinary action

- Provision for a child in conflict with the law to be assisted by parent / guardian / appropriate adult
- Consult with / have legal rep present if making admission / confession / pointing-out / appear as suspect in id parade

THE ACCUSED: HIS PRESENCE AS A PARTY

The general rule: S158 of the CPA:

All criminal proceedings must take place in the presence of the accused, unless provided for otherwise.

This provision applies at all times during the trial, verdict and sentencing stages.

This rule is also confirmed in S34 and S35 of the constitution:

S34: everyone has the right to have any dispute that can be resolved by application of law, decided in a fair public hearing by a court.

S35 (3): every accused person has the right to a fair trial, which includes the right:

1. To a public trial before an ordinary court
2. To be present when being tried
3. To adduce and challenge evidence

Radebe: the magistrate changed the A's suspension of his driver's license in his absence. On review it was held that the magistrate acted irregularly

This rule illustrates that the A must not only know what the witnesses have said but there must also be a confrontation (i.e. he must see them as they testify against him).

The denial of this fundamental right of the A amounts to a failure of justice that will lead to the setting aside of his conviction on appeal or review.

Exceptions to the general rule:

Generally all criminal proceedings must take place in the presence of the A - but this need not happen when:

1. Trial in the absence of the A on account of his misbehavior:

S159 (1) of the CPA: says that if the A conducts himself in such a manner as to render the continuance of the proceedings in his presence impractical, the court may order him to be removed and may direct that the trial proceed in his absence.

The court will only do this as a last resort and they would rather prefer to postpone or temporarily adjourn and continue later in the presence of the A.

Before using S159 the court should 1st warn the A that he could be removed.

And the A should, if removed, be given a further opportunity to be brought back to the proceedings and asked if he wants to give evidence.

2. Absence of the A where there is more than 1 A:

If 2 or more A appear jointly, the court may allow an A to be absent, where he has applied for this on the following grounds:

- a) His physical condition is such that he isn't able to attend
 - b) Its necessary for him to be absent due to death or illness of a family member
- If the A is absent as a result of S159 (misbehavior) or simply without the leave of the court, then the court can order that the proceedings continue in the absence of the A. BUT the court will only do so if the delay would cause undue prejudice, embarrassment or inconvenience.
 - The court can also order a separation of trials – when the A returns the proceedings will then continue from the point at which he became absent.
 - If the proceedings continue in his absence, he may examine witnesses who had testified during his absence and can also inspect the record.

3. Evidence by means of CCTV:

A witness or an A can give evidence by means of CCTV, if the facilitates are available and if it would be: convenient, prevent delays, save costs, be in the interest of the state or there is a likelihood that the person could be harmed if they testify

Reasons must be provided if an u/14 is refused to give evidence by cctv

4. Payment of a fine without appearance in court

S57:

This is called an admission of guilt.

If the clerk of the court believes that the magistrate, on convicting the A, will impose a fine not exceeding R5000 he can, when he issues the summons – endorse the summons to the effect that the A may admit his guilt in respect of the offence and pay the fine stipulated on the summons WITHOUT appearing in court.

After the A has made his 1st appearance, BUT before he has pleaded, the PP may hand to the A a written notice with a similar endorsement

A can pay the admission of guilt to the clerk of the Magistrate Court or to the police.

The summons may stipulate a date by which the admission must be paid.

NB: the admission of guilt amounts to a CONVICTION and SENTENCE and will be regarded as a PREVIOUS CONVICTION.

The PP can reduce the amount of the fine if good cause is shown.

This procedure is only used for statutory offences (e.g. traffic offences)

Compounding of minor offences:

S341:

Difference between compounding and admission of guilt:

Compounding of minor offences	Admission of guilt
Offender pays the amount in order not to be prosecuted	Offender pays the amount in the summons or written notice to prevent going to court
By paying it doesn't amount to a previous conviction and sentence.	By signing the A = convicted and sentenced

Compounding of minor offences is only used in minor traffic offences and contravention of local authorities – parking ticket.

CRIMINAL PROCEDURE ACT:

S158: Criminal proceedings to take place in presence of accused.

1. Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
2.
 - a. A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
 - b. A court may make a similar order on the application of an accused or a witness.
3. A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would—
 - a. Prevent unreasonable delay
 - b. Save costs
 - c. Be convenient
 - d. Be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
 - e. Prevent the likelihood that prejudice or harm might

result to any person if he or she testifies or is present at such proceedings.

4. The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

S159: Circumstances in which criminal proceedings may take place in absence of accused.

1. If an accused at criminal proceedings conducts himself in a manner, which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.
2. If two or more accused appear jointly at criminal proceedings and—
 - a. The court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative—
 - i. That the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or
 - ii. That circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or
 - b. Any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may—
 - i. In the case of paragraph (a), authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and
 - ii. Direct that the proceedings be proceeded with in the absence of the accused concerned.
3. Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in

respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

4. If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he be detained at a place indicated by the court and for the period which the court deems necessary in order that he can recover and be brought before the court so that an order for his further detention for the purposes of his trial can be obtained.

S160. Procedure at criminal proceedings where accused is absent.

1. If an accused referred to in section 159 (1) or (2) again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.
2. If the examination of a witness under subsection (1) takes place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or such co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.
3.
 - a. When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court shall, subject to the provisions of paragraph (b), postpone the proceedings until such absent accused is in attendance and, if necessary, further postpone the proceedings until the evidence, if any, on behalf of that accused has been led.
 - b. If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings

had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

- c. When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he is again in attendance.

REQUIRMENT OF REASONABLENESS:

The Bill of Rights in the constitution protects the property and personality rights of individuals.

In terms of criminal law, the rights, which could be infringed, include:

- ❖ The rights to body
- ❖ Freedom
- ❖ Honour
- ❖ Dignity
- ❖ Privacy
- ❖ Property.

These rights aren't however unlimited and can be limited in the interests of society and the interests of others.

When a right in the Bill of Rights is being limited, it must be justified in terms of S36

The limitation:

- a) Must be contained in the law of general application
- b) Must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

In considering whether a particular limitation complies with these requirements, a court must take into consideration all relevant factors including:

- a) The nature of the right
- b) The NB of the purpose of the limitation
- c) The nature and extent of the limitation
- d) The relation between the limitation and its purpose
- e) Less restrictive means to achieve the purpose

In criminal prosecutions the aim is to protect the interests of society and bring offender to justice.

The requirement of reasonableness in the exercise of the powers

Certain guidelines can be followed:

- a) The requirement of reasonableness may be described as a requirement that there be reasonable grounds from which an inference can be drawn
- b) A person will only be said to have reasonable grounds to believe or suspect something or that certain action is necessary if:
 - 1. He really believes or suspects it
 - 2. His belief or suspicion is based on grounds and
 - 3. In the circumstances and in view of these grounds an reasonable person would have had the same belief or suspicion

- c) There must be grounds (facts) for the suspicion or belief, if the suspicion or belief is reconcilable with the available facts
- d) Once a person has established what the facts really are, he will evaluate them and make an inference from those facts with regard to the existence or otherwise of other facts, which he is at the time, unable to establish
- e) Once he has made the inferences that the other facts exist, it can be said that the person himself believes or suspects that such facts exist
- f) BUT the mere fact that a certain person believes or suspects that certain facts exist, isn't sufficient to regard his belief as one based on reasonable grounds as required by law. This will only be the case if it can be said that any reasonable person would have held the same belief in the circumstances
- g) A person can therefore be said to have reasonable grounds to believe or suspect something if he actually believes it based on facts from which he has drawn an inference and if any reasonable person would also have drawn the same belief.

SECURING THE ATTENDANCE OF THE A:

In terms of S38 of the CPA: there are various means by which an A's attendance at the trial may be secured:

1. Summons
2. Written notice to appear
3. Indictment
4. Arrest

SUMMONS:

This is used for a summary trial in a lower court where the A isn't in custody or about to be arrested.

This will be used if the state has no reason to believe that the A will abscond, attempt to hamper police investigations or attempt to influence state witnesses.

S54:

1. PP draws up the charge, with info relating to the name, address and occupation of the A and hands it to the clerk of the court.
2. The clerk issues the summons specifying the place, date and time for appearance of the A in court and specifies the charge.
3. Clerk hands the summons to the person empowered to serve.
4. Summons is served by delivering it to the person named therein, or if he can't be found, by delivering it to his place of residence, employment or business or to a person over 16 and apparently residing there.
5. Service must take place at least 14 days before the date fixed for trial.

If the person summoned fails to appear, he commits an offence and is liable to a fine or imprisonment not exceeding 3 months (S55).

The court may issue a warrant for the A arrest and must endorse it to the effect that the A may admit his guilt in respect thereof and pay the amount stipulated.

CJA:

- Can summons a child to appear at preliminary inquiry
- Served on child in presence of parent / guardian / appropriate adult who must sign to acknowledge receipt
- If not possible – serve on child and copy ASAP thereafter on parent / guardian – both must sign to acknowledge receipt
- Inform of allegations against the child / explain procedure / warn to appear @ place with date & time (parent to bring child)
- Notify PO concerned within 24 hours after service on child

WRITTEN NOTICE TO APPEAR:

Used if a peace officer on reasonable grounds believes a magistrate court, on convicting the A won't sentence him to a fine exceeding R5000

Procedure:

1. Hand the A written notice: specifying the name, address and occupation of the A
2. The notice will call on the A to appear at a place, on a date and at a specific time to answer the charge.
3. The notice will contain an endorsement that the A may admit his guilt and pay a fine without appearing in court (S57)
4. The notice will contain a certificate signed by the peace officer – saying he handed the original notice to the A and explained the importance thereof

CJA:

- Written notice permitted in case of schedule 1 offence
- Cant make provision for child to admit and pay guilt fine
- Hand to child in present of parent / guardian who must sign
- If not, hand to child and ASAP to parent / guardian = both sign
- Inform of allegations against the child / explain procedure / warn to appear @ place with date & time (parent to bring child)
- Notify PO concerned within 24 hours of handing notice to child

INDICTMENT:

Used for trial in a superior court and is drawn up in the name of the DPP

Contains:

1. The charge
2. The name, address, sex, nationality and Age of the A.
3. Summary of substantial facts
4. List of names and addresses of state Witnesses.

The indictment together with the notice of the trial is served on the A at least 10 days before the date of trial – unless the A agrees to a shorter period.

ARREST

Arrest leads to the infringement of a number of rights = including the right to freedom of movement, for this limitation of such rights to be valid there are strict requirements for arrest

REQUIREMENTS FOR LAWFUL ARREST:

1. The arrest must be properly **authorized** = it must be done in terms of a valid warrant or in circumstances without a warrant governed by S40
2. The arrestor must exercise **physical control** over the arrestee – he must limit the arrestee's freedom of movement = actually touching the person, or if required forcibly confining him.
3. Must **inform** the arrestee of the reason for his arrest and if applicable hand over the warrant on demand.
S35 (2)(a): he has the right to be informed of the reason for his arrest, once told of this reason his detention will be lawful. The arrestee's custody will be unlawful if this requirement isn't complied with BUT the detention will become lawful if he is informed later of the reason
The exact wording of the charge need not be conveyed.
 - If a child is arrested the police official must – inform child of allegations / rights / explain procedure + notify parent / guardian of arrest
4. The arrestee must be taken to the appropriate authorities as soon as possible: S50 (1): the arrestee must as soon as possible be brought to a police station = reason for this is that the A must not be detained for longer than 48 hours, but this period begins to run from the time the suspect is at the station

Min of Safety and Security v Sekhoto and another – confirmed above requirements + said there is no additional jurisdictional fact that there must be no less invasive options available in order to bring the suspect before court, before an arrest will be lawful

ARREST WITH A WARRANT:

WARRANT = written order directing that a person described in the warrant be arrested by a peace officer in respect of the offence set out in the warrant.

The issue of the warrant:

DPP, PP or police can apply in writing to the magistrate or justice of the peace to issue a warrant for the arrest of a person.

Such application must:

1. Set out the alleged offence
2. Allege that the offence was committed in the area of jurisdiction of the magistrate or if not the arrestee is suspected of being in the area
3. State that from information taken upon oath there is reasonable suspicion that the person (named in the warrant) committed the alleged offence.

A warrant may be issued on any day and remains in force until its cancelled or executed.

A warrant issued in one district is valid in all other districts in SA

CJA – warrant issued u/s43 re a child must state that the child be brought to appear at a preliminary inquiry

Execution of the warrant of arrest:

Executed by a peace officer (S44)

Peace officer: includes – magistrate, justice of the peace etc.

Person isn't liable if he reasonably believed that he was arresting the correct person (i.e. the person named in the warrant) and arrests the wrong person.

The test is whether the reasonable person, who takes reasonable care, would have believed that the arrestee was the person named in the warrant

A warrant of arrest permits a peace officer to execute the warrant – BUT no obligation on him to do so – S44: does not intend & never intended to prevent a PO from exercising a discretion not to arrest should circumstances requirements that (*Theobald v Min of Safety & Security*)

S39 (2): the arrestee can demand a copy of the warrant – if the policeman doesn't have a copy of the warrant when it is demanded – then the arrest will be unlawful (*Minister van Veiligheid v Rautenbach*)

CJA – limits powers to arrest a child

- Cant arrest a child between 10 – 18 for schedule 1 offence unless compelling reasons exist

Reasons:

- ⇒ Doesn't have fixed address
- ⇒ Will continue to commit offence unless arrested
- ⇒ A danger to himself or others
- ⇒ Offence in process of being committed

ARREST WITHOUT A WARRANT:

Sometimes the delay caused by getting a warrant will enable the suspect to escape – so provision must be made for arrest without a warrant in certain circumstances.

ARREST MADE BY POLICE OFFICERS:

S40: every peace officer may without a warrant arrest:

1. Anyone who commits or attempts to commit any offence in his presence (*Mhlana*)

2. Any person he reasonably suspects of having committed a Schedule 1 offence:
 - a. The PO must be certain the act constitutes a crime
 - b. Reasonably suspects that there is a factual basis for Suspicion
 - c. The PO need not at this stage have the intention of bringing the arrested person to court to be prosecuted
 - d. A reasonable suspicion with and intention to make further inquiries is enough.
3. Person who has escaped or attempted to escape from lawful custody – Such person must KNOW that the arrestee has escaped lawful custody
4. Anyone who has in his possession any housebreaking implement and who can't account for possession to the satisfaction of the PO = the possession of housebreaking/car breaking implements in suspicious circumstances = an offence in terms of CPA.
5. Any person found in possession of anything that the PO reasonably suspects to be stolen
6. Person found at any place at night in circumstances where the PO reasonably suspects the person has committed or is about to commit an offence – the purpose of the arrest is to investigate whether the person committed an offence or not.
7. Person reasonably suspected of being in unlawful possession of stock or produce
8. Person reasonably suspected of committing an offence under any law governing the making, supply, possession or conveyance of liquor, drugs or arms and ammunition.
9. Any person gambling unlawfully
10. Person who obstructs a PO in the execution of his duties
11. Anyone against whom a reasonable suspicion exists of him committing an offence outside SA, which if committed in SA, would be an offence and for which he is under any law relating to extradition of fugitive offenders, liable to be arrested.
12. Person reasonable suspected of being an illegal immigrant
13. Person reasonably suspected of being a deserter of the SADF
14. Person reasonably suspected of failing to comply with a condition imposed in the postponing of passing sentence
15. Person reasonably suspected of having failed to pay a fine
16. Person who fails to surrender himself to undergo periodical imprisonment

GETTING THE NAME AND ADDRESS OF A SUSPECT:

S41 of the Criminal Procedure Act:

PO can call upon any person:

- a. Who he has the power to arrest
- b. Who he reasonably suspects of having committed an offence or
- c. Who may be able to give evidence with regard to an offence

To furnish his name and address.

If such person fails to give his name and address or there is reasonable suspicion that the name and address are false, the PO can arrest him and detain him for up to 12 hours.

Failure by such a person to give his name and address or giving a false name = punishable by a fine or imprisonment without the option of a fine for a period of 3 months.

ARREST BY A PRIVATE PERSON:

S42: a private person can, without a warrant, arrest the following:

1. Person who commits or attempts to commit a Schedule 1 offence in his presence or who he RS of having committed such an offence
2. Person who he reasonably believes has committed an offence and is escaping from someone authorized to arrest him
3. Any person he is entitled to arrest in terms of law (e.g. stock theft)
4. Any person he sees engages in a fight
5. Any owner, lawful occupier or person in charge of property on which a person is found committing an offence.

This power of private individuals should be exercised sparingly

PROCEDURE AFTER ARREST:

An arrested person must be brought to a police station as soon as possible after his arrest – because of the 48-hour rule

S50 envisages 2 periods of custody:

1. Arrest before the arrival to the police station
2. Period after arrival at the police station.

Once at the police station, he is in the custody of the police and can't be detained for more than 48 hours.

Normal enforcement officers (other than the police) don't have powers of detention. (E.g. where the arrested person is unlawfully detained in the back of a municipal police van because police cells are full)

Once he is in police custody he is either:

- a) Released because no charges are brought against him
- b) Brought before a lower court within 48 hours (1st appearance)

At his court appearance the following could happen:

1. He is either remanded in custody pending further investigation or for his trial or
2. Be released on bail or warning.

The 48 hour rule is extended by **S50:**

If the 48-hour period expires:

- a) On a day which isn't a court day, or on a court day after 4pm, then the period is deemed to expire at 4pm on the next court day = if a person is arrested on Wednesday evening, the 48 hour period is deemed to expire the next Monday at 4pm
- b) On any court day before 4pm, then the period is deemed to expire at 4pm on such a day
- c) While the arrestee is outside the jurisdiction of the court and he is at the time of expiry in transit from the place of detention to the court, then the period is deemed to expire at 4pm on the next court day after the day on which the arrestee was brought into the courts area of jurisdiction. (*Hoco v Mtekana*)
- d) Deemed to expire at a time when the arrestee can't be brought before the court because of his physical illness or condition be brought before the court. The court can order he be detained at a place specified (hospital) for such period that the court may deem necessary so he can recuperate – to prevent abuse.

Periodical court: if the 48hr period expires on a day when periodical court isn't in session, the arrested person should be brought before a district court which has jurisdiction over the area of the periodical court.

If the arrestee is held for more than 48 hours, detention is unlawful and his escape won't be unlawful = *Mtungwa*

SPECIAL MEASURES RELATING TO CHILDREN

CHILD u/10

- ⇒ Lack criminal capacity = cant be prosecuted
- ⇒ If child u/10 commits offence = hand child over to parent / guardian / if not in best interest to hand to aforementioned / not available = to suitable child / youth care centre
- ⇒ NOTIFY PO
- ⇒ PO to assess the child asap not later – 7days

After assessment:

- Refer child to children's court / counseling / therapy / program to suit needs of u/10 / arrange support services / meeting with parent / guardian

CHILD above 10 BUT below 18

- Right not to be detained – last resort only – then only for shortest possible time
- Kept separate from adults & boys / girls separate
- Protected against maltreatment / neglect / abuse etc
- Not endanger the child's well-being / eddo / physical / mental health
- Cant arrest for schedule 1 offence – unless compelling reasons
- If schedule 2 / 3 – police official must take into consideration same reasons
- If arrested, release into care of parent / guardian asap and hand written notice

Should child NOT be released from detention b4 prelim – consider detention in appropriate child / youth care centre if available if not available – police-cell / lock-up

If a child is to be detained after the prelim - PO to provide inquiry magistrate with reasons why the child may not be released.

THE DUTY TO ARREST:

General rule: there's no obligation on a private individual to arrest someone.

EXCEPTION:

S47 (1): every male 16-60 is required to assist a police official in arresting and detaining a person if required to do so.

Failure to render assistance is an offence punishable by a fine or imprisonment for a period not exceeding 3 months.

Civil Aviation Act = Authorizes a person can call on any person to assist to effect arrest & use such force reasonably necessary to overcome resistance / prevent fleeing

**RESISTING ARREST AND ATTEMPTS TO FLEE:
USE OF FORCE:**

S49 of the CPA: Use of force in effecting arrest

For the purposes of this section—

- ❖ **“Arrestor”** means any person authorized under this Act to arrest or to assist in arresting a suspect; and
- ❖ **“Suspect”** means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—

1. That the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm
2. That there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
3. That the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

The onus rest on the arrestor to prove:

- a) He was lawfully entitled to arrest the suspect
- b) That he attempted to arrest him
- c) That the suspect attempted to escape by fleeing or offering resistance
- d) That a degree of force was reasonably necessary to affect the arrest.

Matlou: in the case of a fugitive its contemplated that the killing will be justified if the escape cant reasonably be prevented in any other way. If the circumstances allow, an oral warning must 1st be given, then a shot in the ground or the air. If that doesn't succeed, shoot the suspect in the leg – do everything in ones power to avoid killing or injuring the suspect.

Govender: the suspect was driving a stolen car and the police pursued with their lights flashing. They failed to stop, a police officer on foot shouted a warning and then fired a shot into the ground, convinced that the suspect couldn't be brought to justice in another way, he fired a shot into the suspect's leg – rendering him a paraplegic. The court used a wide interpretation of the requirement of reasonableness under S49, and looked at:

- Age of the fugitive
- Whether or not they were armed
- Could they have been brought to justice in another way

Jooste: force used in the course of an arrest must be reasonably necessary in the circumstances

BEFORE: the use of deadly force while affecting an arrest was justified in the Act in the sense that it amounted to justifiable homicide.

BUT in Ex Parte: Minister of Safety and Security: In Re S v Walters and another: the constitutional court declared this section to be unconstitutional = it can no longer be relied on by someone who kills a suspect in an attempt to arrest the suspect.

Example

In **Basson**: *B (constable) fired at night at a car he had signaled to stop and wounded one of the passengers. It appeared that the police had been informed that 2-armed convicts were fleeing in a stolen Chevrolet. A Ford came past at high speed and didn't react to B and the other official's signs to stop. B then fired. According to the court, B could not have reasonable grounds to believe that the convicts were in the Ford. In terms of Transvaal Ordinance, it was an offence for the driver of a car to refuse to stop if instructed by a police official = driver committed an offence in the presence of B.*

HELD: to seriously assault the offender for this type of offence couldn't be justified = B found guilty.

The court in **S v Walters**: stated the law with regard to the use of force in order to affect an arrest as follows:

The purpose of arrest is to bring the suspect before court for trial and arrest isn't the only way of achieving this.

The purpose of arrest ISNT to punish the offender

If force has to be used it must be REASONABLE and NECESSARY

The requirements for the use of force:

The following requirements must be complied with before an arrestor may use force in order to affect the arrest:

1. The suspect must have committed an offence – if he is suspected is must be a reasonable suspicion
2. The arrestor must be lawfully entitled to arrest = in terms of a valid warrant or according to S40
3. The arrestor must attempt to arrest the suspect
4. The arrestor must have the intention to arrest and not to punish the suspect: must have the intention to bring the suspect before court
5. The suspect must attempt to escape by fleeing or offering resistance
6. The suspect must know that an attempt is being made to arrest him and must be informed of the intention and continue to try and flee. *Barnard*
7. There must be no other reasonable means available to effect the arrest – there are other ways to secure the attendance of a person
8. May be used to effect the arrest must be reasonably necessary and proportional in all the circumstances = look at the requirement of reasonableness
9. The force must be directed at the suspected offender

EXTRADITION:

In terms of international law principles, the government of every sovereign state has authority over everything happening within the borders of that state.

The state doesn't generally have jurisdiction to punish people for offences committed elsewhere

Where a person commits a crime in one state and flees to another state and fails to return of his own accord, the state where the crime was committed is powerless to act.

Extradition makes provision for such a person to be extradited to the state in whose area of jurisdiction the crime was committed.

Extradition agreements/treaties have certain corresponding principles:

1. Extradition is granted only in respect of serious crimes or according to the principles of double criminality – if the crime is punishable in terms of the law of both states.
2. A person isn't extradited to a foreign state if he is charged with a crime of a political nature
3. According to the principle of specialty a person is tried in the state to which he is extradited only for the crime in respect of which he has been extradited except if the extraditing state consents to a further new charge
4. Extradition is refused if the crime for which extradition is sought is punishable by the death sentence in terms of the law of the state requesting extradition and if the law of the state to which the request was made, doesn't make provision for the death sentence for such crime.
5. An extradition agreement contains a ne bis in idem rule – corresponds with acquittal and conviction

INTERROGATION, INTERCEPTION AND ESTABLISHING BODILY FEATURES

General Powers to interrogate:

The police don't need any special powers to interrogate

The need for special powers arises only when a person refuses to grant police access to someone they wish to interrogate, refuses to respond to police questioning or answers the questions but refuses to give them his name in order to be subpoenaed to testify.

There is no legal duty on persons to furnish information that they may have concerning the commission of an offence to the police.

ENTRY TO PREMISES TO INTERROGATE:

If the person in charge of premises refuses access for the purposes of interrogation:

S26 of the CPA: police official may, when he reasonably suspects that a person who may furnish information with regard to any such offence is on any premises, enter the premises without a warrant to interrogate such a person and get a statement from him.

BUT: the police may not enter without the consent of the occupier of the dwelling. This is designed to prevent police getting access without 1st getting permission. If however entry is refused and it will hamper police investigation:

S27 (1): a police official who may lawfully enter in terms of S26, may use such force as may be reasonably necessary to overcome any resistance against such entry, including breaking a door or window.

BUT: the police first audibly demand admission and notify the purpose for which he seeks to enter the premises

POSSIBLE WITNESSES:

If the DPP or PP requests it, a judge or magistrate can require the attendance, for examination, of any person likely to give material information as to the alleged offence

If the person furnishes the information to the satisfaction of the DPP or PP, he need not appear before a judicial officer BUT if he fails or refuses to do so it constitutes an offence

S205: is designed to compel a person to reveal his knowledge of an alleged crime, which knowledge he refused to disclose to the police.

ASCERTAINMENT OF BODILY FEATURES

S37 of the CPA: getting data through:

- Fingerprints
- ID parades
- Ascertainment of bodily features
- Blood samples
- Photos

Huma: this doesn't violate the right to silence and dignity.

Only a suspect or A can be fingerprinted and only medical staff take blood samples.

Xaba: the police wanted to use reasonable force, including a surgical procedure to remove a bullet from the respondents thigh – he was a suspect in hijacking and the police believed the bullet would connect him to the crime. He refused.

The police said that in terms of search and seizure and S37 allowed for this.

The court said that the police couldn't search a suspect by operating, this isn't covered by S27 and such power could not be delegated to the doctor.

Data obtained under S37 must be destroyed if the person is acquitted or criminal proceedings don't continue

SEARCH AND SEIZURE

The constitution:

S12: everyone has the right of freedom and security of his person, which includes the right not to be treated in a cruel, inhuman and degrading manner.

S14: everyone has the right to privacy, which includes the right not to have their person, home or property searched or possessions seized.

S35 (5): evidence obtained in a manner that violates any fundamental right, must be excluded if the admission of that evidence would render the trial unfair.

S36: these rights may be limited by reasonable and justifiable limitations imposed by the law of general application.

ARTICLES, WHICH CAN BE SEIZED:

S20 of the CPA: the power to search is granted only where the object is to find a certain person or seize one of the following articles:

1. Articles used in the commission of a crime, or on reasonable grounds suspected of being used in the commission of a crime.
2. Articles which may afford evidence of the commission of an offence
3. Articles, which are intended to be used in the commission of an offence.

The only exception relates to documents, which are privileged.

SEARCH WARRANT

GENERAL RULE: S21 (1): search and seizure should be conducted in terms of a search warrant issued by a judicial officer (magistrate/judge)

The JO must decide if there are reasonable grounds for the search and he must decide if the article that is to be searched for is one that may be seized in terms of S20.

The JO must exercise this discretion in a reasonable manner, in accordance with the law and while taking all relevant facts into account.

S21 (1): an article referred to in S20 can only be seized in terms of a search warrant issued:

1. By a magistrate or justice of the peace who believes that there are reasonable grounds to believe that the article is in his area of jurisdiction
2. By a judge or JO who believes the article is required for evidence.

S21 (2): a warrant must direct a police official to seize the article must, thus, authorize him to search any person identified in the warrant and search anyone found on the premises.

Warrants to maintain internal security and law and order:

Warrant in terms of S25

S24 stipulates that if it appears to the magistrate or justice from information on oath that there are reasonable grounds for believing:

- a) That the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held on any premises within his area of jurisdiction
 - b) That an offence has been or is likely to be committed in his area
- He may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose
- 1) Of carrying out such investigations or taking steps necessary to preserve the internal security of the Republic or maintain law and order or for the prevention of any offence
 - 2) Of searching premises or any person on the premises for an article referred to in S20
 - 3) Of seizing such an article

SEARCH WITHOUT A WARRANT:

The delay in getting the search warrant would defeat the object of the search.

POLICE:

S22 (a): a police official may search any person, container or premises for the purpose of seizing an article referred to in S20 if the person concerned consents to such a search

S22 (a) they can search if such a police official believes on reasonable grounds that:

1. A search warrant will be issued if he applies for one AND
2. That the delay in getting such a warrant would defeat the object of the search.

S25 (3) allows a police official to act without a warrant if he believes on reasonable grounds,

- a) That a warrant will be issued to him under S25 if he applies AND
- b) The delay in getting one would defeat the object

PRIVATE OCCUPIERS OF PROPERTY

S24: any person who is lawfully in charge or occupation of any premises and who reasonably suspects that

- 1) Stolen stock or produce is on the premises
- 2) Any article has been placed therein or is in the custody or possession of any person on the premises, in contravention of the law relating to
 - a. Intoxicating liquor
 - b. Dependence producing drugs
 - c. Arms and ammunition
 - d. Explosives

SEARCH FOR PURPOSES OF MAKING AN ARREST:

In terms of S48 a police official and private person who is:

- 1. Authorized by law to effect an arrest
- 2. And who knows or reasonable suspects such a person to be on the premises may
- 3. If he 1st audibly demands entry onto the premises and states the purpose for such entry and fails to gain such entry
- 4. Break open and enter premises for the purpose of effecting the arrest

SEARCH OF AN ARRESTED PERSON

S23: On the arrest of any person, the person making the arrest, provided he's a police official, may search the person arrested and seize any article referred to in S20, which is in the possession or under the control of the arrested person.

If the person making the arrest isn't a police official, he has no power to search the arrested person. He does however have the power to seize an article referred to in S20, which is in the possession or control of the arrested person.

The private person must hand the seized object to a police official.

If the article could cause bodily harm, he must place it in safe custody.

THE USE OF FORCE IN CONDUCTING A SEARCH

S27 (1): a police official who may lawfully search any person/premises may use such force as reasonable necessary to overcome any resistance against such entry/search, including breaking a door or window.

PROVISO: S27 (2) – the police official; must first audibly demand entry and state the purpose for the search

NOTE: the proviso DOESN'T APPLY if the police official on reasonable grounds believes that the article that is being searched for any be destroyed or disposed of = NO KNOCK CLAUSE

General requirements of propriety:

S29: woman shall be searched by woman only.

If no female's police official is available, the search may be made by a woman designated for the purpose.

This also applies to males.

CONSEQUENCES OF AN UNLAWFUL SEARCH:

Formal consequences	Substantive consequences
S35 (5) of the Constitution: exclusionary rule: evidence obtained in a way that violates FUR must be excluded if the evidence would render the trial unfair or be detrimental to the administration of justice	If the police commits an offence liability in terms of a fine or imprisonment not exceeding 6 months ○ Acts against S21 (warrant) ○ Searched the person without authority ○ Performs any act against S25

The aggrieved person can also claim damages for an unlawful search

Disposal and forfeiture of seized objects

Normally an article seized by a police official is kept in police custody and if required for criminal proceedings, will be handed to the clerk of the magistrate court or the registrar of the High court for safe keeping.

At the end of the proceedings the JO must make an appropriate order in respect of the disposal of the articles – either return to owner or forfeited to the state.

If no proceedings are instituted, the articles are returned to the person who may lawfully possess it or they are forfeited to the state.

Once notified a person may take delivery of the item within 30 days, or it will be forfeited to the state.

S28: Wrongful search an offence, and award of damages.

A police official who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25 (1) who, without being authorized

- ❖ Searches any person or container or premises or seizes or detains any article; or
- ❖ Performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25 (1),

Shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months

Where any person falsely gives information on oath under section 21 (1) or 25 (1) and a search warrant or, as the case may be, a warrant is issued and executed on such information, and such person is in consequence of such false information convicted of perjury, the court convicting such person may, upon the application of any person who has suffered damage in consequence of the unlawful entry, search or seizure, as the case may be, or upon the application of the prosecutor acting on the instructions of that person, award compensation in respect of such damage, whereupon the provisions of section 300 shall *mutatis mutandis* apply with reference to such award.

S29. Search to be conducted in decent and orderly manner

A search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

S30. Disposal by police official of article after seizure.

A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered—

- a. May, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require; or
- b. May, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or
- c. Shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a

distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.

S31. Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings

If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.

If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.

S32. Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

S33. Article to be transferred to court for purposes of trial

If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official charged with the investigation shall, subject to the

provisions of subsection (2) of this section, deliver such article to the clerk of the court where such criminal proceedings are instituted.

If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court in terms of subsection (1), the clerk of the court may require the police official in charge of the investigation to retain the article in police custody or in such other custody as may be determined in terms of section 30 (c).

The clerk of the court shall place any article received in safe custody, which may include the deposit of money in an official banking account if such money is not required at the trial for the purposes of evidence.

Where the trial in question is to be conducted in a court other than a court of which such clerk is the clerk of the court, such clerk of the court shall—

- ❖ Transfer any article received under subsection (1), other than money deposited in a banking account under paragraph (a) of this subsection, to the clerk of the court or, as the case may be, the registrar of the court in which the trial is to be conducted, and such clerk or registrar of the court shall place such article in safe custody
- ❖ In the case of any article retained in police custody or in some other custody in accordance with the provisions of subsection (2) or in the case of any money deposited in a banking account under paragraph (a) of this subsection, advise the clerk or registrar of such other court of the fact of such custody or such deposit, as the case may be.

S34. Disposal of article after commencement of criminal proceedings

The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law, under which any matter shall or may be forfeited, make an order that any article referred to in section 33—

1. Be returned to the person from whom it was seized, if such person may lawfully possess such article
2. If such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article
3. If no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

The court may, for the purpose of any order hear such additional evidence, whether by affidavit or orally, as it may deem fit.

If the judge or judicial officer concerned does not, at the conclusion of

the relevant proceedings, make an order such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he may deem fit.

Any order made may be suspended pending any appeal or review.

S35. Forfeiture of article to State

A court, which convicts an accused of any offence, may, without notice to any person, declare—

- ❖ Any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- ❖ If the conviction is in respect of an offence referred to in Part I of Schedule 1, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State: Provided that such forfeiture shall not affect any right referred to in subparagraph (i) or (ii) of subsection (4) (a) if it is proved that person who claims such right did not know that such weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.
- ❖ A court which convicts an accused or which finds an accused not guilty of any offence, shall declare forfeited to the State any article seized under the provisions of this Act, which is forged, or counterfeit or which cannot lawfully be possessed by any person.
- ❖ Any weapon, instrument, vehicle, container or other article declared forfeited under the provisions of subsection (1), shall be kept for a period of thirty days with effect from the date of declaration of forfeiture or, if an application is within that period received from any person for the determination of any right referred to in subparagraph (i) or (ii) of subsection (4) (a), until a final decision in respect of any such application has been given.
- ❖ The court in question or, if the judge or judicial officer concerned is not available, any judge or judicial officer of the court in question, may at any time within a period of three years with effect from the date of declaration of forfeiture, upon the application of any person, other than the accused,

who claims that any right referred to in subparagraph (i) or (ii) of this paragraph is vested in him, inquire into and determine any such right, and if the court finds that the weapon, instrument, vehicle, container or other article in question

- Is the property of any such person, the court shall set aside the declaration of forfeiture and direct that the weapon, instrument, vehicle, container or other article, as the case may be, be returned to such person, or, if the State has disposed of the weapon, instrument, vehicle, container or other article in question, direct that such person be compensated by the State to the extent to which the State has been enriched by such disposal;
- Was sold to the accused in pursuance of a contract under which he becomes the owner of such weapon, instrument, vehicle, container or other article, as the case may be, upon the payment of a stipulated price, whether by installments or otherwise, and under which the seller becomes entitled to the return of such weapon, instrument, vehicle, container or other article upon default of payment of the stipulated price or any part thereof—
 - The court shall direct that the weapon, instrument, vehicle, container or other article in question be sold by public auction and that the said seller be paid out of the proceeds of the sale an amount equal to the value of his rights under the contract to the weapon, instrument, vehicle, container or other article, but not exceeding the proceeds of the sale; or
 - If the State has disposed of the weapon, instrument, vehicle, container or other article in question, the court shall direct that the said seller be likewise compensated.

If a determination by the court under paragraph (a) is adverse to the applicant, he may appeal there from as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the declaration of forfeiture was made, or against a sentence imposed as a result of such conviction.

When determining any rights under this subsection, the record of the criminal proceedings in which the declaration of forfeiture was made, shall form part of the relevant proceedings, and the court making the determination may hear such additional evidence, whether by affidavit or orally, as it may deem fit.

BAIL

S58 CPA: the A will be released after bail is paid or he has given a guarantee that it will be paid and he must appear on the date and place appointed for the trial

S35 of the Constitution: A has the right to be released from detention if it's in the interests of justice and subject to reasonable conditions

BASICS OF BAIL:

- Bail is non penal = not meant as a punishment
- To determine bail it's a balance between the interests of society and the liberty of the A
- Bail can be refused on grounds stated in S60
- Court must determine if the A will stand trial if released or if he will interfere with the states case
- Courts must interpret the meaning of bail to promote the rights in the constitution (S39 of the Constitution)

INQUISITORIAL ROLE OF THE COURT IN A BAIL APPLICATION:

In SA the adversarial system is used, but a bail application includes some inquisitorial features.

In a bail application the court plays a more active role

The court can of its own accord determine if the A wants bail.

The court can inquire in an informal way the information needed regarding matters that ARE NOT in dispute.

If matters are in dispute the court can require the A/ PP to adduce evidence.

Where the PP doesn't oppose the bail under S60: the court can ask for reasons on why they don't oppose

FREE SYSTEM OF EVIDENCE APPLIES:

The strict evidential rules applicable in criminal proceedings will be relaxed in a bail application.

Hearsay evidence (evidence, the probative value of which depends on the credibility of a non witness – generally inadmissible) is admissible.

Bail applications are generally urgent so statements i.e. oral statements from the A/PP from the bar (ex parte) can be admitted Affidavits can also be admitted as evidence, whereas generally in a criminal trial oral evidence is required

S12 of the Constitution: provides that everyone has the right to freedom and security of person, which includes the right not to be deprived arbitrarily or without just cause.

- ❖ It's not the purpose of bail to punish the A, its non-penal in character.
- ❖ The fact that bail is non-penal in character does not mean that an A's prior unlawful conduct pending trial must be ignored (*Rudolph*)
- ❖ Delays caused by the prosecution (unless *mala fide*) is not reason that bail should be granted (*Ali*)

CJA – Release of child – S25

MUST consider a child's bail application if:

- The interest of justice permit the release of the child on bail; and
- Separate inquire must be held into the ability of the child and / parent / guardian to pay amount considered as bail; and
- If not able to pay – set conditions that doesn't include \$ for the release of the child or;
- Can pay – set conditions for release and \$ that is appropriate

POLICE BAIL:

S59 of the CPA: bail can in certain limited circumstances be granted by the police = POLICE BAIL.

This is done to ensure pre-trial release on bail can in respect of trivial offences be secured as soon as possible – even before 1st appearance at a lower court.

If police bail can't be granted to it can and it's been refused, the A has every right to apply to a lower court for bail at his 1st compulsory appearance.

- ❖ May be released on bail by any police official of or above the rank of non-commissioned officer, if the A deposits at the police station a sum of money determined by such police official.
- ❖ The police official who has the power to determine the police bail is required to consult with the police official charged with the investigation – investigating officer.
- ❖ The police official, must at the time of releasing the A on bail, complete and hand to the A a receipt for the sum of money deposited as bail – the date, place and time of the trial must appear.

Limitations:

Only cash payments may be received for police bail.

Release can only take place before the A 1st appearance in a lower court.

Discretionary special conditions can't be added by the police when releasing the A on police bail, BUT a court can add special provisions.

An action for damages will lie, should the police bail be refused on malicious grounds or where the police official simply refused to exercise his discretion (Shaw v Collins).

PROSECUTORS BAIL:

S59A

The DPP may in consultation with the investigating officer, authorize the release of the A on bail = prosecutorial bail.

The effect of prosecutorial bail is that the person who is in custody shall be released from custody:

- a) On payment of a sum of money determined for his bail at his place of detention.
- b) Subject to reasonable conditions imposed by the DPP or prosecutor concerned.
- c) The payment of such sum of money or the giving of a guarantee and the imposition of the condition.

CJA & S59A – Prosecutor may before child appearance at preliminary inquiry authorize the release of child – BUT – only re schedule 1 / 2 offences

ALWAYS = give preference to release of child

COURT BAIL:

S60 (1) of the CPA: an A who is in custody in respect of an offence shall be entitled to be released on bail at any stage preceding his conviction in respect of such an offence, unless the court finds that its in the interests of justice that he be detained in custody.

When a person is arrested he must be informed as soon as possible of his right to institute bail proceedings and if he isn't granted bail under S59, he can ask to be brought before a lower court to apply.

BUT: the court can postpone any bail proceedings (not for more than 7 days at a time) if:

- a) The court believes that it has insufficient information or evidence at its disposal to reach a decision on bail.
- b) The court believes that the state should be given a reasonable opportunity to: procure material evidence that may be lost if bail is granted.
- c) The court believes it's in the interests of justice to do so.

Appeal by the A to the High Court against the Lower Courts decision concerning bail

An A who considers himself aggrieved by the refusal of a lower court to admit him bail or by the imposition by the court of a condition of bail, including the condition amounting to the amount of bail money – may appeal against such refusal or the imposition of the condition to a High Court having jurisdiction.

A must serve a copy of the appeal on the DPP and Magistrate and the notice must set out the specific grounds for appeal.

The Magistrate Court must then give reasons for its decision to the High Court.

If the High court refuses to change the decision, further appeal is possible, BUT only with the leave of the High Court that heard the appeal.

A brief reason by the court for dismissal of a bail application is NOT sufficient ground for appeal and for the court of appeal to infer that not enough weight was given to the considerations set out – *Ali – scant but clear reasons were given*

Appeal by the DPP against a decision to release the A on bail

The DPP can appeal to the High court against the decision of the lower court to release the A on bail.

The DPP can also appeal to the SCA against the decision of a High court to release the A on bail.

The court hearing the appeal may order that the State should pay the A's costs (in whole or in part) which the A incurred in opposing the appeal.

In the event of a successful appeal against a release on bail, the court, which heard the appeal, shall issue a warrant of arrest for the A.

The risks and factors, which must be considered in determining a bail application

The main question asked by the courts: will the interests of justice be prejudiced if the A is granted bail?

4 subsidiary questions:

- 1) Will the A stand trial if he is released on bail?
- 2) Will he interfere with state witnesses or police investigation?
- 3) Will he commit further crimes?
- 4) Will his release be prejudicial to the maintenance of law and order?

S60 (4) of the CPA: the refusal to grant bail will be in the interests of justice if one or more of the following are established:

Where there is a likelihood that the A if released:

- a) Would endanger the safety of the public.
- b) Will attempt to evade his trial
- c) Will attempt to intimidate witnesses
- d) Will jeopardize the proper functioning of the criminal justice system
- e) Will disturb public peace and order

S60 (4) (a): endangering the safety of the public:

- 1) The degree of violence towards others implicit in the charge
- 2) Any threat of violence the A may have made to another

- 3) Any resentment the A harbors towards another
- 4) Any disposition of violence, as evident from past behavior
- 5) Prevalence from the type of crime
- 6) Evidence that the A previously committed an offence while on bail

If there is a risk of repetition of the same conduct, the interests of society outweigh the interests of the A

S60 (4) (b): likelihood of the A evading bail:

- a) Emotional, community and occupational ties the A has to the place he is being tried
- b) Assets held by the A and their location
- c) Means and travel documents held by the A, which enable him to leave SA
- d) The extent to which he can afford to forfeit bail money
- e) The nature and gravity of the charge against him
- f) Nature and gravity of the punishment that's likely to be imposed
- g) The ease with which the bail conditions can be breached

S60 (4) (c): the influencing or intimidating of witnesses:

- a) The fact that the A is familiar with the identity of the witnesses and evidence, which they may bring against him.
- b) Whether witnesses have already made statements and agreed to testify
- c) Whether the investigation has already been completed
- d) The relationship of the A with the witnesses and the extent to which they may be influenced
- e) How effective bail conditions prohibiting communication are likely to be
- f) Whether the A has access to evidential material which is to be presented at the trial
- g) The ease with which such evidence could be concealed or destroyed.

S60 (4) (d): undermine or jeopardize the functioning of the criminal justice system

- a) The A, knowing it to be false, supplied false information at the time of his arrest and during his bail proceedings
- b) The A is in custody on another charge or the A is on parole
- c) Previous failure on the part of the A to comply with bail conditions or there is an indication that he won't comply with them

S60 (4) (e): jeopardize peace and public order:

- a) Whether the nature of the offence or the circumstances under which the offence was committed, is likely to induce a sense of shock in the community where it was committed.
- b) If the shock might lead to public disorder if the A is released.
- c) If the safety of the A might be jeopardized by his release

- d) If the sense of peace and security of members of the public will be undermined by the release of the A
- e) If the release would jeopardize the public's confidence in the criminal justice system.

The court will take into account the following factors:

- 1) The period for which the A has already been in custody.
- 2) The probable period of detention until the conclusion of the trial if the A isn't released on bail
- 3) The reason for any delay in the conclusion of the trial
- 4) Any financial loss, which the A may suffer.
- 5) Any other factor, which in the opinion of the court should be taken into account.

AMOUNT OF BAIL:

An excessive amount, which really amounts to refusal of bail, shouldn't be fixed.

Bail should be fixed at an amount that should not only be paid, but will make it advantageous to the A to stand trial rather than to flee and forfeit the money.

There must be a careful investigation into the means and resources of the A.

CJA – inquiry into the ability of the child / parent / guardian / appropriate adult to pay

BAIL CONDITIONS:

The court may make the release of the A on bail subject to conditions, which in the court's opinion are in the interests of justice = S60 (12) discretionary special conditions.

Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether bail is granted by that court or any other court, add any further conditions of bail:

- a) With regard to A reporting to a specific person, at a specific place and time
- b) With regard to any place the A is forbidden to go
- c) With regard to prohibition of communication between A and the witnesses for the State
- d) With regard to the place at which documents can be served on him
- e) Which will ensure that the proper administration of justice isn't placed in jeopardy

In *Jacobs* the court held that appropriate conditions could be as effective for the admin of justice as payment of \$

The legal representative of the A shouldn't pay bail for the benefit of his client, it's generally considered unethical.

CJA – if found that child / parent / guardian etc cant pay any amount of \$ - presiding officer must set appropriate conditions that excludes amount of \$ for the release of the child

CANCELLATION OF BAIL:

1. Failure to observe bail conditions

PP can apply to lead evidence to prove that the A failed to comply with a condition of bail, the court before which the charge is pending must, if the A is present and denies that he failed to comply with the conditions or that the failure to comply wasn't due to fault on his part, proceed to hear such evidence as the prosecutor and the A may place before it.

The court may cancel bail and declare the bail money forfeited to the State – no appeal lies against an order for the cancellation of bail.

2. Failure to appear: procedure and consequences

If the A who is released on bail fails:

- a) To appear at the place and on the date and time appointed for his trial
- b) To remain in attendance

The court must cancel the bail provisionally, declare the bails money provisionally forfeited to the State and issue a warrant for the arrest of the A.

If the A doesn't appear within 14 days of the issue of the warrant of arrest, or if he does appear but fails to satisfy the court that his failure wasn't his fault, the provisional cancellation and forfeiture become final.

If he satisfies the court that his failure wasn't due to fault on his part, the provisional cancellation and forfeiture lapses.

3. Cancellation of bail where the A is about to abscond:

If the court has evidence on oath that:

- a) A is about to evade justice or abscond
- b) A threatens witnesses
- c) He defeats the ends of justice
- d) He poses a threat to public safety
- e) Its in the interests of justice to do so

It may issue a warrant for his arrest. He will then be committed to prison until the conclusion of the trial unless the court reinstates bail.

CJA – S27: RELEASE OTHER THAN BAIL

Placement options **MUST** be considered if a child is not released before 1st appearance at preliminary inquiry:

- Child & youth centre
- Protection if in police custody
- Prison

RELEASE ON WARNING:

An accused may be released by the court or the police and warned to appear before a specific court at a specific time and date.

The accused's release doesn't depend on the deposit of money or certain conditions.

This procedure is followed with lesser offences where there is no reason to believe that the accused will try to abscond or evade justice.

S63 – SA prisons are overcrowded. A number of prisoners (unsentenced prisoners), which are people who have been granted bail, but can't afford to pay it.

These people aren't meant to be in prison pending the outcome of their trial – BUT their inability to pay the bail money keeps them in prison.

When the application is made, it must be considered in the presence of the accused.

If any amendment is made to the bail conditions – it has to be done in the presence of the accused.

PREVIOUS CONVICTIONS:

Proof of previous convictions:

Previous convictions can be proved by the state in the course of a bail application. The A or his legal representative is also obliged to inform the court whether the A has previously been convicted of an offence.

Any charges pending against the A must also be discharged by him.

If it's the legal representative who submits the information, the A is obliged to declare that he confirms it.

An A who willfully fails or refuses to comply with the provision commits an offence.

Admissibility of the record of the bail proceedings at the subsequent trial:

the record, excluding the information relating to the previous convictions, forms part of the record of the trial.

Thus the trial court will have access to all information given at the bail application.

PROVISO: if the A elects to testify during the bail proceedings, the court must inform him that anything that he says may be used against him at the subsequent trial.
Thus it must be clear that he was informed of his constitutional right to silence and the privilege against self-incrimination.

Meaning of exceptional circumstances, as used in bail proceedings:

an A could prove that there are exceptional circumstances relating to his emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case – i.e.

- Bail applicants terminal illness
- Urgent medical operation
- Cast iron alibi
- Exceptional circumstances are present when the A has adduced acceptable evidence that the prosecutors case against him is non-existent or subject to serious doubt
- Failure of the state to adduce evidence contradicting the A's denial of guilt
- Lengthy period of incarceration
- Good conduct of the A during the period of release after the initial period of detention

The standard of proof that an A must satisfy in proving exceptional circumstances is proof on a balance of probabilities.

The following don't constitute exceptional circumstances:

- Postponement of the trial for 5 months
- Prior release on bail by a co-A
- Value of goods appearing to be far less than the value initially alleged by the prosecution
- The fact that the applicants business was suffering because of his detention

In *Rudolph* the judge concluded that 'ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified'.

BAIL APPLICATIONS BY WAY OF AUDIOVISUAL LINK

- Possible if older than 18
- In limited circumstances court can hear bail app whilst applicant physically in prison
- Not available if prosecution oppose bail / evidence requirements
- Court can direct that applicant physically appear b4 it
- Only in certain mags districts and with regard to certain prisons

PRE TRIAL EXAMINATIONS

SUMMARY TRIAL

Summary trial: when it's not preceded by a preparatory examination. The DPP or any person authorized by him can designate any court, which has jurisdiction, as the forum for the summary trial. Once the court is designated the A will be brought before that court and the trial begins.

When the A is in custody he is first brought before a lower court, even though that court has no jurisdiction to try him = S75

S75: before the summary trial starts in a superior court, the DPP can either order that a preparatory examination be held or that the A be required to plead in a Magistrate court to the charge against him, although the court doesn't have jurisdiction to try the offender or to impose an appropriate punishment.

Plea in a Magistrate Court on a charge justifiable in a Regional court:

S122: when the A appears in a Magistrate Court and the alleged offence may be tried by a regional court but not by a Magistrate Court, or the prosecutor informs the court that he is of the opinion that the offence is of such a nature that it merits punishment in excess of the jurisdiction of the Regional court, the prosecutor may put the relevant charge to the A, who shall be required by the Magistrate Court to plead it.

If the A pleads not guilty – the Magistrate may question him in terms of S115 and thereafter commit him to a summary trial to the Regional Court concerned.

If the A pleads guilty, he is questioned in terms of S112 and the Magistrate if he is satisfied that the A is guilty, will refer the A to sentencing at the Regional Court.

If the Magistrate isn't satisfied that the A is guilty, he will enter a plea of not guilty and submit the A to a summary trial in the Regional Court.

Plea in the Magistrate court on a charge justifiable in the High Court:

Called a mini-preparatory examination – the purpose of this is to ease the workload of the High Court.

It's a sifting process whereby a preparatory examination or a superior court trial may be eliminated in certain cases, where on account of the possible co-operation of the A at an early stage, the charge proves to be less serious than it was initially though.

When an A appears in a Magistrate Court and the alleged offence may be tried by a Superior Court only, or it's of such a serious nature that

it merits punishment in excess of the jurisdiction of the Magistrates Court, the prosecutor may on the instructions of the DPP, put the charge to the A in the Magistrate Court.

The Magistrate doesn't determine the charge on which the A must stand trial; the proceedings just serve as an aid to the DPP in determining the charge.

When the A pleads guilty, the Magistrate questions him to ascertain whether he admits the allegations in the charge – if satisfied he stops proceedings, pending the decision of the DPP.

The DPP may decide to arraign the A for sentence before a Superior Court.

If the Magistrate isn't satisfied that the A admits the allegations, he must record in what respect he isn't satisfied and enter a plea of not guilty.

The Magistrate must advise the A of the decision of the DPP – if the decision is that the A be arraigned for sentence:

- a) In the Magistrate Court concerned, the court must dispose of the case and the proceedings continue as though no interruption occurred.
- b) In the Regional or Superior Court, the Magistrate must adjourn the case for sentence by such court.

When the A pleads not guilty, S122 provides that the court must act in terms of S115: the Magistrate asks the A whether he wishes to make a statement indicating the basis of his defence.

The court may put any questions to the A.

When S115 has been complied with, the Magistrate must stop the proceedings and adjourn the case pending the decision of the DPP who may:

- a) Arraign the A on any charge at a summary trial before a Superior Court or any other court having jurisdiction or
- b) Institute a preparatory examination against the A

PREPARATORY EXAMINATION:

it's a criminal proceeding, but it isn't a trial as the final decision rests with the DPP and not with the court.

It's an examination, which is held before a magistrate, to determine whether the evidence presented before him justifies a trial in a Superior court or any other court, which has jurisdiction.

The A isn't in trial and he isn't required to plead at the commencement of the proceedings, but only at the conclusion after all the evidence has been led.

The Magistrate doesn't make a finding of guilty or not guilty.

If a trial is instituted after, it's a separate proceeding.

The purpose of the examination is to enable the DPP to determine whether the prosecution has a case and whether it's a case that should be prosecuted in a superior or other court.

If the DPP decides on the evidence presented, to prosecute the A in a particular court, the A is then tried by that court.

If the Magistrate discharges the A at the end of the examination, this doesn't have the effect of an acquittal.

If the A is informed by the Magistrate that the DPP has decided not to prosecute him, he may be charged with the same crime again.

When a preparatory examination is to be held:

S123 lays down that if the DPP is of the opinion that it's necessary for more effective administration of justice, he may decide to order the holding of a preparatory examination before the A is tried in a Superior court or other court with jurisdiction.

PREPARATORY EXAMINATION AND PRE-TRIAL EXAMINATION TO BE DISTINGUISHED FROM A PRELIMINARY INQUIRY

Preliminary inquiry:

- Provided in CJA
- If child suspected of committing an offence – 1st appear at prelim
- Purpose is to consider if matter should be diverted away from formal criminal justice process
- Informal pre-trial procedure – inquisitorial in nature
- Held in court / any suitable place
- Can be followed by summary trial – but purpose is to consider diversion
- If diverted no summary trial will follow
- If not diverted – matter will be referred to a child justice court
- Child justice court will try the case in line with CPA along with necessary changes as per the CJA

CHILD JUSTICE ACT

The Act protects the rights of children who are accused or who have committed crimes. Children must still be treated as children.

Criminal capacity of a child – before a child can be held liable it must be established if the child can distinguish between right and wrong and act in accordance.

- ❖ Child under 10 cant be prosecuted
- ❖ 10 -14 are rebuttably presumed to be not accountable
- ❖ Over 14 are liable

Offences:

Schedule 1:

- Theft (value under R2500)
- Fraud, forgery or uttering (under value of R1500)
- Malicious damage to property (under value of R1500)
- Common assault
- Perjury

Schedule 2:

- Theft (over value R2500)
- Fraud, forgery, uttering (over value of R1500)
- Robbery with aggravating circumstances
- Malicious damage to property (over value R1500)
- Assault GBH

Schedule 3:

- Treason
- Sedition
- Murder
- Extortion with aggravating circumstances
- Kidnapping

PRE TRIAL PROCEEDINGS:

To secure the attendance of the child at the preliminary enquiry:

- Written notice
- Summons
- Arrest

After arrest – there must be an assessment of the child

WRITTEN NOTICE TO APPEAR:

Child suspected of committing a schedule 1 offence = written notice to appear at the preliminary enquiry. It doesn't contain an admission of guilt.

Written notice contains the date, place and time of the inquiry and is handed to the child in the presence of a parent, guardian or appropriate adult and must be signed or marked by the child/adult.

The police officer handing over the written notice must:

- Tell the child and adult of the charges
- Tell them of the rights of the child
- Explain the procedures
- Warn the child to attend and remain in attendance
- Warn the adult that the child must appear
- Within 24 hours of the handing over of the written notice – tell the probation officer

SUMMONS:

S54: date, place and time of the inquiry – served on the child in the presence of a parent, guardian or appropriate adult. The police officer must:

- Tell the child and adult of the charges
- Tell them of the rights of the child
- Explain the procedures
- Warn the child to attend and remain in attendance
- Warn the adult that the child must appear
- Within 24 hours of the handing over of the written notice – tell the probation officer

ARREST:

S43 CPA AND S40 APPLIES – unless the child committed a schedule 1 offence.

GR: can't arrest the child for a schedule 1 offence unless:

- Reason to believe the child has no fixed address
- Reason to believe the child will continue to commit offences
- Reason to believe the child would be a danger to others

Once arrested:

- Inform the child/adult of the charge
- Tell them of the child's rights
- Tell them of the procedures
- Notify the parent/ guardian/ appropriate adult of the arrest
- Within 24 hours inform the probation officer

A child that has been arrested and remains in custody must be brought before the magistrate court, within 48 hours (S50 re extension of the 48 hours applies).

Child v Adult re arrest:

After arrest: 48 hour rule

Adult: S50: on arrest the person must be taken to the authorities asap and informed of the right to apply for bail. After 48 hours the suspect must be:

- Released
- 1st appearance before the court

Child: after arrest must be taken to the authorities asap – informed of right to bail – brought before magistrate within 48 hours = for assessment by probation officer, preliminary inquiry and / or diversion option.

For both an adult and a child the 48-hour rule can be extended by S50

1st appearance:

Adult: at the 1st appearance: must be told of the charge against him and the right to apply for bail or given a reason for further detention.

Child:

- Before the 1st appearance – the officer can release the child accused of a schedule 1 offence to an adults custody
- PP can authorize the release of a child on bail (S25) for a schedule 1 or 2 offence
- At the 1st appearance at the preliminary inquiry – the presiding officer can release the child on bail in terms of S25

Postponement:

For both an adult and a child – the postponement can't be more than 7 days

Admission of guilt:

Adult: S56 CPA: if the A commits an offence which doesn't merit a fine of more than a determined amount – hand the A written notice to appear which contains an admission of guilt

Child: S22 CJA: if the child commits a schedule 1 offence = released on written warning into the care of an adult

For schedule 2 and 3: S56 of CPA applies but there will NOT be an admission of guilt

Release on warning:

Adult: S72 CPA: police or court can release the A on warning and give written notice of the date, place and time of the trial – if the A fails to attend a warrant of arrest will be issued

Child: S24 CJA: presiding officer can release the child into the care of an appropriate adult (schedule 3) or on his own recognizance (schedule 1 and 2) if it's in the interests of justice. The court looks at:

- Best interests of the child
- Child's previous convictions
- Age of the child: 10 – 14
- Interests and safety of the community
- Seriousness of the offence

If the child is released on warning - there can be an imposition of conditions.

If the child fails to comply with the conditions or fails to appear =

- Warrant of arrest/
- Summons issued

For the child to appear before the preliminary inquiry or the CJC

BAIL

S21 CJA:

- ❖ Schedule 1: can be released by police officer before 1st appearance (S59 CPA)
- ❖ Schedule 1 and 2: PP can authorize the release of the child on bail
- ❖ Presiding officer at the 1st appearance at the preliminary inquiry/ CJC can release the child on bail, subject to:
 - Interests of justice permit the release
 - Look at the child's ability to pay the bail amount
 - If there are a lack of funds – impose conditions besides payment

PLACEMENT:

If the child isn't released on bail – the least restrictive form of detention must be applied.

Before the 1st appearance the police must consider the placement of the child in a childcare facility. Placement in a childcare facility can be ordered by the presiding officer.

Before 1st appearance:

- ❖ Child 10-14
 - ❖ Over 14 for schedule 1/ 2
- Child can be detained at a childcare facility

If the child is over 14 and committed a schedule 3 offence = detain in a police cell.

The presiding officer can demand placement at any stage, but must look at:

- Age and maturity
- Offence
- Child is a danger to himself or other children at the facility
- Availability at the child care facility

PO: ORDER IMPRISONMENT IF:

- Bail is refused or the child breaches conditions
- Child over 14 and is charged with a schedule 3 offence
- Detention is necessary in the interests of justice
- Protect the public/ child
- Likelihood that if convicted the child will be imprisoned

PROTECTION OF THE CHILD IN POLICE CUSTODY:

Child must be detained:

- With their gender
- In conditions that take into account the child's vulnerability
- Permit visits from parents, guardian, adult, legal representative, social worker etc
- Receive healthcare, food, water and bedding

Tell the probation officer:

PRE TRIAL ASSESSMENT

The parole officer must make a report to determine if the child is in the need of a care and protection order, the officer must:

- Estimate the age of a child
- Gather information on the child's history
- Recommendations on the child's release or detention
- Estimate the prospects of diversion

All this information is confidential and can only be used for the purposes of the Act.

This information is inadmissible as evidence during a bail application, plea, trial or sentence

The assessment must take place in a private place

The officer must explain the purposes of the assessment to the child and tell the child his rights

The assessment report must contain:

- Possibility of referring the child to the Child Court
- Appropriateness of diversion
- Possibility of release and the placement in the custody of a parent, guardian or adult
- If the child is between 10-14, if the child had capacity
- Estimated age of the child if it is uncertain

THE PRELIMINARY ENQUIRY

The preliminary enquiry is an informal inquisitorial proceeding in court and the purpose is to consider the probation officers report.

The court must:

- See if the matter can be diverted
- Look at the type of diversion that could apply
- See if the matter must be referred to the Child court
- Establish if the child needs placement pending the conclusion of the trial

This enquiry must take place within 48 hours of arrest or within the time stipulated in the summons or written notice

The child is asked if he/she acknowledges responsibility for the offence – if so the PO will consider the assessment of the report and other relevant information.

The child actively participates actively in the proceedings

DIVERSION

Is done in order to prevent the child from being exposed to the adverse effects of the formal justice system.

Purposes of diversion:

- Deal with the child outside the justice system
- Promote reintegration into the community
- Prevent the child from having a criminal record
- Encourage the child to take responsibility
- Allow an affected person to express their views
- Prevent reoffending
- Promote the dignity of the child

When deciding on diversion the following play a role: the child's culture and religion, the nature of the offence and the interests of society, the Childs age and development.

Levels of diversion:

Level 1	Level 2
Schedule 1 offences: the time periods mustn't exceed: ○ 12 months if the child is under 14 ○ 24 months if the child is 14 and above Requires: ▪ Apology ▪ Caution ▪ Placement ▪ Counseling ▪ Symbolic restitution ▪ Community service	Schedule 2 and 3 offences: the time period mustn't exceed: ○ 24 months if the child is under 14 ○ 48 months if the child is 14 and above Requires: ▪ Intensive therapy ▪ Supervision of a probation officer

PROSECUTORIAL DIVERSION S41:

The prosecutor can divert the matter before the preliminary enquiry, for schedule one offences, and only to a level 1 diversion. The prosecutor must be satisfied that:

- The child acknowledges responsibility for the offence
- There is a prima facie case for prosecution of the child
- The child, his parent, guardian or an appropriate adult consents

If the child is between the ages of 10 and 14 – it must be established that they had criminal capacity and the prosecution takes into account if the child has a record or previous diversion

DIVERSION AT THE PRELIMINARY ENQUIRY S52:

- The child must acknowledge responsibility for the offence and not be unduly influenced to do so
- There must be a prima facie case against the child
- The child, parent, guardian or appropriate adult must consent

Look at the recommendation of the prosecutor (schedule 1 and 2) and the DPP (schedule 3): on diversion

- ❖ Look at the views of the victims
- ❖ Consult with the police official responsible for the investigation

DIVERSION BY THE CHILD JUSTICE COURT:

A matter can be diverted at any time before the conclusion of the case.

The proceedings are postponed pending the child's compliance with the diversion order – the court must warn the child that any failure to comply with the order may result in any acknowledgement of the responsibility being recorded as an admission should the trial continue.

After the probation officer tells the court that the child has complied with diversion order and the court is satisfied – the court can then make an order to stop the proceedings.

TRIAL IN THE TRIAL JUSTICE COURT

The child must appear before a court having jurisdiction. The court must:

- Told the child of the allegations
- Tell the child his rights
- Explain the procedure

The court must ensure that the best interests of the child are upheld and can:

- Get additional information from any person involved
- Ensure that the child, especially during cross examination is treated fairly, cross examinations isn't unduly harsh and the questioning is appropriate regarding age and understanding of the child

POSTPONEMENT:

The court must conclude the trial as quickly as possible and limit postponement:

- If the child is in detention in prison – cant postpone for longer than 14 days at a time
- If the child is detained at the child care centre – cant postpone for longer than 30 days at a time
- If the child has been released – cant postpone for longer than 60 days at a time

The court can before conclusion of the prosecutions case make an order for diversion:

The court must warn the child that failure to comply with the diversion order could result in acknowledgement of responsibility, being recorded as an admission if the trial proceeds.

The court can stop proceedings if the child complies with the diversion order

Bibliography:

- ⇒ **Criminal Procedure Act 51 of 1977**
- ⇒ **Child Justice Act 75 of 2008**
- ⇒ **Joubert, JJ (ed). 2014. *Criminal procedure handbook*. 11th edition. Claremont: Juta & Co**
- ⇒ **Criminal Procedure Module 1: Prof JP Swanepoel, Adv T Mokoena, Mr V Basdeo, Ms M Karels**